APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,

Petitioner,

—v.—

JOHN W. WINGO, WARDEN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 16, 1971
CERTIORARI GRANTED JANUARY 17, 1972

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER, *Petitioner*,

—v.—

JOHN W. WINGO, WARDEN, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CHRISTIAN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

RECORD

FOR THE COMMONWEALTH—

The Honorable James P. Hanratty
The Honorable W. E. Rogers, Jr.
Hopkinsville, Kentucky

FOR THE DEFENDANT—

The Honorable Louis P. McHenry
Hopkinsville, Kentucky

BE IT REMEMBERED:

That the defendant, Willie Mae Barker, was indicted, tried and convicted in the Christian County Circuit Court, proceedings had before the Honorable Ira D. Smith, presiding Judge of the Christian Circuit Court with benefit of a Jury at the trial.

Here follows the Court Record in full in words and figures as follows:

On September 15, 1958, the following Court Order was entered in Commonwealth Order Book No. 24, Page 504.

CHRISTIAN CIRCUIT COURT

SEPTEMBER TERM, 1st day, 15th day of September, 1958.

Came the Grand Jury into Open Court and returned the following Indictment, to-wit:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

* * * *

On September 17, 1958, the following Court Order was entered in Commonwealth Order Book No. 24, Page 507.

SEPTEMBER TERM, 3rd day, 17th day of September, 1958.

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

The defendant was this day brought before the Court and informed by the Court of his Indictment. The Case was ordered set down for trial on *Tuesday, October 21, 1958.* The Court appointed L. P. McHenry and Walter Robinson to represent or defend Willie Mae Barker.

* * * *

On October 23, 1958, the Commonwealth made the following Motion which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered *CONTINUED to the February Term of Court, 1959.*

* * * *

On February 10, 1959, the Commonwealth made the following Motion which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered, set down for trial on Tuesday, March 10, 1959.

* * * * *

THIRD JUDICIAL DISTRICT

CHRISTIAN COUNTY CIRCUIT COURT

SEPTEMBER TERM, 1958

THE COMMONWEALTH OF KENTUCKY

against

WILLIE BARKER

INDICTMENT

THE GRAND JURY of Christian County, in the name of and by the authority of the Commonwealth of Kentucky, accuse Willie Barker of the Crime of WILLFUL MURDER committed in the manner and form as follows, to-wit: That said Willie Barker did in the County and State aforesaid, on the 20th day of July, 1958, and within twelve months before the finding of this indictment, did feloniously, willfully and with malice aforethought, kill and murder Orlena Denton by striking her about the head and body with an iron tire tool, or some other blunt instrument, a deadly weapon, and by beating her about the head and body with his hand and fist, and from which striking and beating, the said Denton did then and there die, against the peace and dignity of the Commonwealth of Kentucky.

/s/ JAMES P. HANRATTY
Commonwealth's Attorney
Third Judicial District, Ky.

#17814

THE COMMONWEALTH OF KENTUCKY

vs.

WILLIE MAE BARKER

INDICTMENT FOR WILLFUL MURDER

A TRUE BILL

/s/ R. C. KING
Foreman

Bail $_____

Presented by the Foreman of the Grand Jury to the said court in the presence of the entire Grand Jury, and received from the Court by me and filed in open court this 15th day of September, 1958.

/s/ DURWOOD T. WALKER
Clerk

By _____
D. C.

"We the Jury find the defendant, Willie Barker—GUILTY of WILLFUL MURDER and fix his punishment at LIFE imprisonment in the State Penitentiary."

/s/ ALEX BRAME
One of the Jury

WITNESSES:

H. H. McKinney
Gordon Hall
Captain Harris
Lt. Pritchett
Booth Morris
Sue Morris
Bill Kennedy
SFC Joe M. Gonzales
Howard Gant

On March 12, 1959, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED CONTINUED to the June Term, 1959, of Court.*

* * * *

On Motion of the Commonwealth, on June 3rd, 1959, the following Order was entered in Commonwealth Order Book No. 24, Page 591, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

Came the Commonwealth and made Motion to continue the above Case until the disposition of the Silas Manning case now in the Court of Appeals. Said continuance was granted, then came attorneys for the defendant and made motion to the Court that a bond be set for the defendant and the Court, after due deliberation, set the Bond at $5000.00 Five Thousand Dollars.

* * * *

On September 22nd, 1959, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered *CONTINUED to the February Term, 1960 Court.*

* * * *

On February 9, 1960, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the June Term of Court, 1960.*

* * * *

On June 6, 1960, the Commonwealth made the following Motion which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the September Term of this Court, 1960.*

* * * *

On September 19th, 1960, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, CONTINUED to the February Term of this Court, 1961.

* * * *

On February 13, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED, CONTINUED to the June Term of Court, 1961.*

* * * *

On June 5, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ordered, *CONTINUED to the September Term, 1961.*

* * * *

On September 18, 1961, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, *CONTINUED to the February Term of this Court, 1962.*

* * * *

On February 12, 1962, the Commonwealth made the following Motion, which reads in full in words and figures:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED CONTINUED, to the June Term, 1962.*

* * * *

On February 12, 1962, Louis P. McHenry, Attorney for the defendant made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

Came the attorney for the defense and filed written Motion for a dismissal. The Court took the Motion under advisement, and will pass on said Motion at a later date, during this Term of Court.

* * * *

On February 26, 1962, the following order was made, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

After hearing argument of Counsel for the defendant on Motion For Dismissal, the Motion was overruled and Case was ORDERED, *CONTINUED to the June Term, 1962.*

* * * *

On June 4, 1962, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was *ORDERED LEFT OPEN, for further consideration.*

* * * *

On September 17, 1962, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, CONTINUED to the February Term of this Court, 1963.

* * * *

On February 11, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion the Commonwealth, the above Cause was ORDERED, set down for trial on Tuesday, March 19, 1963.

* * * *

On March 19, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was ORDERED, *CONTINUED* to the June Term, on account of the illness of the Ex-Sheriff, Harold McKinney, over defendant's objection.

* * * * *

On June 3, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE MAE BARKER

On Motion of the Commonwealth, the above Cause was set down for trial on Wednesday, June 19, 1963.

* * * *

On June 17, 1963, the following order appears in Commonwealth Order Book No. 25, Page 392, which reads in full in words and figures as follows:

No. 17814 WILLFUL MURDER

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

The above Cause was ordered *CONTINUED*, and on objections and exceptions for the defense, The Court placed the Commonwealth under rule and on notice to be prepared and ready for trial at the September Term, otherwise the above Case would be *DISMISSED for lack of prosecution.*

* * * *

On August 24, 1963, the Commonwealth made the following Motion, which reads in full in words and figures as follows:

#17814 WILLFUL MURDER

COMWLTH. OF KENTUCKY

vs.

WILLIE BARKER

On Motion of the Commonwealth, the Attorney for defendant having been advised, the above Cause was set for trial on Wednesday, October 9, 1963.

* * * *

CHRISTIAN CIRCUIT COURT

[Filed in Open Court, Oct. 9, 1963, Attest,
/s/ Durwood T. Walker, Clerk]

Indictment No. 17814

COMMONWEALTH OF KENTUCKY, PLAINTIFF

—*vs*—

WILLIE MAE BARKER, DEFENDANT

MOTION TO DISMISS

Comes the defendant, Willie Mae Barker, through Counsel, and moves the Court to dismiss the action now pending against him in the above styled Court.

He states that he was indicted in the September term of 1958, for the crime of wilful murder, that he is innocent of the charge, and since said indictment and the first call of said case, he has been prepared to prove his innocence.

He states that the prosecution (Commonwealth of Kentucky) has made a motion to continue at each term of Court since February, 1959 term, and said motions were granted over the objections of the defendant.

He further states that he has been deprived of his rights under the constitution of the United States, and the constitution of Kentucky, in that he has been denied of his rights to a speedy trial.

Wherefore, he prays that this motion be granted, and that the case pending against him be dismissed for lack of prosecution on the part of the Commonwealth of Kentucky.

This the 9th day of October, 1963.

/s/ Louis P. McHenry
LOUIS P. MCHENRY
Attorney For Defendant
408½ South Main Street
Hopkinsville, Kentucky

CHRISTIAN CIRCUIT COURT

[Filed in Open Court, Oct. 9, 1963, Attest, /s/ Durwood T. Walker, Clerk]

Indictment No. 17814

COMMONWEALTH OF KENTUCKY, PLAINTIFF

vs.

WILLIE MAE BARKER, DEFENDANT

RESPONSE TO MOTION TO DISMISS

For response to defendant's Motion to Dismiss, comes the Commonwealth of Kentucky and by its attorneys states as follows:

That the defendant and Silas Manning were separately indicated by the September, 1958, term of the Christian County Grand Jury for the willful murder of Pat Denton and Orleana Denton; two indictments were returned against the defendant Manning, one charging the death of Pat Denton and the other the death of Orleana Denton, and two indictments were returned against Barker, one charging the death of Pat Denton and the other the death of Orleana Denton, which murders were charged to have occurred in July, 1958; that the Commonwealth elected to try Manning first and promptly proceeded to trial at the same term of Court with the result that the Jury hung at the first trial which was held on October 23, 1958, and a mistrial was declared; that at the next succeeding term of Christian Circuit Court Manning was again tried with the result that on March 12, 1959, the Jury returned a penalty of death in the electric chair; that Manning appealed his sentence, which sentence was reversed by the Court of Appeals, the mandate being received by the Christian Circuit Court on November 19, 1959; that at the next succeeding term of Christian Circuit Court Manning was again tried and was again given a sentence of death in the electric chair on February 20, 1960; that another appeal ensued and the judg-

ment was reversed by the Court of Appeals, the mandate being received by the Christian Circuit Court on June 23, 1961; that in compliance with the judgment of the Court of Appeals, at the next ensuing term of the Christian Circuit Court on September 22, 1961, defendant Manning was granted a change of venue to Caldwell County Circuit Court; that during the next succeeding term of the Caldwell Circuit Court in October, 1961, Manning was again tried; the jury being unable to agree with the result of another mistrial; that at the next succeeding term of Caldwell Circuit Court Manning in March, 1962, was tried and given a sentence of life; that the foregoing five trials were on the indictment charging the death of Pat Denton; that in the next succeeding term of the Christian Circuit Court held in June, 1962, the Court granted a change of venue to the Todd Circuit Court on an indictment charging the death of Orleana Denton; that in the December, 1962, term of the Todd Circuit Court Manning was tried and given a life sentence; thus Manning on the two indictments was tried a total of six times; that the testimony of Manning against defendant Barker was absolutely necessary in the trial of the Barker indictments and could not be procured until the conclusion of the cases against Manning himself as he always declined to testify for the reason of self-incrimination under advice of his attorneys as shown by the attached affidavit; that the trial of Barker was originally set for the February 1963 term of Christian Circuit Court but could not be held at that time due to the serious and grave illness of former sheriff McKinney as shown by the attached affidavits of said McKinney and his physician, Dr. Harvey Stone; that the case was again set for the June 1963 term but again could not be held at that time due to the illness of McKinney; that upon the recovery of McKinney the trial was held at the next ensuing term of Court in October, 1963.

The Commonwealth states that it has tried the case against Barker as promptly as possible as Manning was an absolutely necessary witness against Barker, being an accomplice and the only one who according to his testimony actually saw Barker in the commission of the crimes; that as pointed out it was not possible to pro-

cure this testimony until the cases against Manning could be concluded, and the Commonwealth states that the cases against Manning were concluded as promptly as possible as he was tried virtually each time at succeeding terms of the Christian, Caldwell and Todd Circuit Courts; that the last two continuances were occasioned by the unavailability of Sheriff McKinney whose testimony was absolutely necessary in corroborating the accomplice Manning; that Barker was granted bail which he made on June 4, 1959, and was at liberty from said date under bail until his conviction, that defendant, through any delay, lost no testimony through the death of witnesses or otherwise, and his case was not affected.

WHEREFORE, the Commonwealth moves that the Motion to Dismiss be itself dismissed and held for naught. This the ninth day of October, 1963.

/s/ James P. Hanratty
JAMES P. HANRATTY
Commonwealth's Attorney
Hopkinsville, Kentucky

/s/ W. E. Rogers
W. E. ROGERS
County Attorney
Christian County,
Hopkinsville, Ky.

CHRISTIAN CIRCUIT COURT

Indictment No. 17814

[Filed Jan. 2, 1964, Doris Owens, Clerk, Court of Appeals]

COMMONWEALTH OF KENTUCKY, PLAINTIFF

—*vs*—

WILLIE MAE BARKER, DEFENDANT

TRANSCRIPT OF EVIDENCE

Hopkinsville, Christian County, Kentucky, October 9, 1963, before The Honorable Ira D. Smith, Judge.

COUNSEL FOR PLAINTIFF:

Mr. W. E. Rogers, Jr.
County Attorney
Hopkinsville, Kentucky

and

Mr. James P. Hanratty
Commonwealth's Attorney
Hopkinsville, Kentucky

COUNSEL FOR DEFENDANT:

Mr. Louis P. McHenry
Hopkinsville, Kentucky

* * * *

[fol. 110] MARTHA BARBER, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. LOUIS P. McHENRY:

Q You are Mrs. Barber?
A Yes, sir.

Q Mrs. Barber, you are the sister-in-law of Silas Manning?

A Yes, sir.

Q Do you recall around July 20, 1958, when Mr. and Mrs. Denton were killed?

A Yes, sir.

Q I believe this was on a Saturday. Do you recall seeing Barker on that night prior to that?

A Yes, sir.

Q Just tell The Court in your own words, whether Barker was at your house, at your sister's house, that night. Tell them what you know. You have testified in all these trials, haven't you?

[fol. 111] A Yes, sir. Well, all I know is that Silas Manning he left that Saturday night around about 11:30 or 12:00 and didn't come in until about day that morning and Will Barker was there at the house.

Q He was there all night long?

A Yes, sir.

Q Now, did you see Silas when he came in that morning?

A Yes, sir, I did.

Q How was he dressed?

A What do you mean? What did he have on?

Q Yes, shirt, coat or

A Yes, he had on a shirt and a pair of pants.

Q Did you see him when he first came in?

A Yes, sir.

Q What was the condition of his clothes?

A He had blood all over his clothes and the front of his shirt.

Q Now, were you the one who woke up Barker?

A Yes, I was.

Q What did you tell him then?

A I told him to wake up because here was Silas.

Q Did he see Silas then?

A Yes, because Silas was there in the kitchen. The light burned all night long in the kitchen.

Q Now, had Silas changed his clothes then?

A Well, I think he had done pulled his shirt off and [fol. 112] burned it.

Q Had pulled his shirt off and burned it?

A Yes.

Q Did you hear he and Barker talking?

A I think—if I am not mistaken—it has been so long I just don't know how to think. I think he asked Silas where was his car.

Q What did Silas say to him?

A He said somebody had done stole it, but he would get it.

Q He told him somebody had stolen it, but he would get it?

A Yes, sir.

Q And you are positively sure that this man was in the house all night long?

A I am sure of that.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 2046

WILLIE MAE BARKER, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ORDER

The above petitioner, a state prisoner, has caused to be filed with this Court a petition for writ of habeas corpus questioning the legality of a life sentence on the ground that he was denied his right to a speedy trial by a five year lapse of time between his indictment and trial. Leave to proceed in forma pauperis has been granted and an order to show cause has issued to which a return has been made.

The question herein raised by petitioner was raised on the appeal of his conviction which the Kentucky Court of Appeals affirmed, holding that there was no showing of prejudice resulting from the delay and that petitioner had waived his right to a speedy trial by his failure to so move until February 12, 1963. Barker v. Commonwealth, Ky., 385 S.W.2d 671 (1964).

The Sixth Amendment right to a speedy trial was not applied to the states until after petitioner's conviction and appeal, Klopfer v. North Carolina, 386 U.S. 213. However, as the Kentucky Court of Appeals concluded, serious questions of due process are raised by a delay of five years time. We shall therefore review the record of petitioner's case in light of federal constitutional standards. (Respondent has filed the transcripts of court records and testimony.)

It is well settled that the right to a speedy trial is, by necessity, relative, United States v. Ewell, 383 U.S. 116;

Von Feldt v. United States, 407 F.2d 95 (8th Cir., 1969). Among the factors that must be taken into consideration in determining if the right has been violated are the length of the delay, the reasons for the delay, the prejudice to the defendant caused by the delay, waiver of the right by the defendant, and the blame-worthiness of the prosecution and defense, Odem v. United States, 410 F.2d 103 (5th Cir., 1969); Harling v. United States, 401 F.2d 392 (D.C. Cir., 1968). In applying the above to a specific case relevant considerations include: whether the delay was purposeful or oppressive, United States ex rel Solomon v. Mancuse, 412 F.2d 88 (2nd. Cir., 1969); Bandy v. United States, 408 F.2d 518 (8th Cir., 1969); whether defendant had the assistance of counsel during the delay, United States v. Peacock, 400 F.2d 992 (6th Cir., 1968); whether defendant was at liberty during the delay, Von Feldt v. United States, *supra*, at p. 98; and whether or not it appears that defendant's ability to defend himself was impaired by the delay, United States v. Ewell, *supra*, at p. 120; Bynum v. United States, 408 F.2d 1207 (D.C. Cir., 1969).

Early in the morning of July 20, 1958 one Pat Denton and his wife, Orleana, were beaten to death in their home near Hopkinsville, Kentucky. Shortly thereafter Silas Manning and petitioner were arrested and charged with the murders. Indictments were returned in September and on October 23, 1958 Manning went to trial. A hung jury resulted and on March 12, 1959 he was tried again. At this trial Manning was found guilty and sentenced to death. On October 16, 1959 the Kentucky Court of Appeals reversed, Manning v. Commonwealth, Ky., 328 S.W.2d 421 (1959), and February 20, 1960 was subsequently set as Manning's next trial date. Again he was found guilty and sentenced to death and again the Court of Appeals reversed, Manning v. Commonwealth, Ky., 346 S.W.2d 755 (1961). In October 1961 Manning again went on trial and for the second time a hung jury resulted. In March 1962 Manning was tried and found guilty of the murder of Pat Denton and

in December 1962 he was tried and found guilty of the murder of Orleana Denton. Manning received a life sentence following each of these trials. On October 9, 1963 petitioner was tried.

In responding to a 1963 motion to dismiss filed by petitioner in the Christian County Court the Commonwealth's Attorney contended, and respondent now contends, that Manning's testimony was absolutely necessary to convict petitioner and that Manning's attorneys had advised him not to testify until his own case was settled. (Throughout his six trials Manning never took the stand.) Following Manning's final trial petitioner's trial was set for the February 1963 term of the Christian Court but was continued due to the fact that Harold McKinney was seriously ill at that time. Mr. McKinney was the sheriff of Christian County and had conducted the investigation of the murders and was therefore considered by the prosecution to be a necessary witness. Whether or not petitioner could have been convicted without Manning's or McKinney's testimony is left open. Suffice it to say that their testimony (especially Manning's) played a major part in petitioner's conviction and the prosecution's reluctance to proceed without these witnesses cannot be interpreted as a lack of diligence, Harling v. United States, 401 F.2d 392, 395 (D.C. Cir., 1968); Odem v. United States, *supra*.

The records of the Christian Circuit Court reflect that L. P. McHenry and Walter Robinson were appointed to defend petitioner on October 21, 1958. On June 3, 1959 petitioner was released on $5,000 bond and remained on bond until after his conviction. On February 26, 1962 and again on October 9, 1963 petitioner's attorneys moved to dismiss giving as grounds therefor that the Commonwealth had failed to prosecute and that petitioner *had been denied* his right to a speedy trial, however, it does not appear that petitioner at any time actually moved for a speedy trial. Furthermore, even if petitioner's February motion to dismiss could be interpreted as a demand for a speedy trial, then it was petitioner's first such demand and the ensuing eight month delay cannot be deemed

unreasonable in light of the fact that a material witness was seriously ill and unable to testify.

That the right to a speedy trial is a personal right which will be deemed waived if not asserted is not absolute, Pitts v. State of North Carolina, 395 F.2d 182, 187 (4th Cir., 1968); United States v. Hephner, 410 F.2d 930 (7th Cir., 1969). In a case where the defendant does not know of his rights or of the pending charges, or because of his incarceration and ignorance cannot assert his rights, waiver is not recognized. Here, however, petitioner was free on bail and had the assistance of counsel. Petitioner does not urge that his counsel were lax in their duty by not moving for a speedy trial nor would this Court look favorably upon such an allegation under the facts of this case. In light of the fact that petitioner's accomplice had twice received the death penalty counsel could have justifiably concluded that the best available strategy was to keep their client on bail as long as possible.

While there is authority to the effect that a delay of the magnitude found here constitutes a prima facie showing of prejudice, *Pitts*, supra, such is overcome in the case at bar by the trial record. While the defense presented at trial appears weak, such weakness cannot be attributed to the unavailability of witnesses or the diminished recollection of witnesses. If any witnesses were not available such has not been brought to the Court's attention and it would appear that everyone concerned testified. Nor is the recollection of the witnesses challenged. In fact it appears that the witnesses at petitioner's trial had been kept constantly abreast of their activities on the morning of July 20, 1958 by the six Manning trials.

The right to a speedy trial involves a balancing of interests. On the one hand the defendant cannot be made to linger in a legal limbo while the prosecution builds its case, but on the other hand the right is not intended to preclude the rights of public justice, Beavers v. Haubert, 198 U.S. 77, 87. Under the facts of the present case the interest of public justice prevails. To hold otherwise would be to force prosecutions to proceed un-

prepared when there has been no demand for trial by an informed defendant.

Petitioner also questions the legality of his sentence in the light of Rule 9.62, Kentucky Rules of Criminal Procedure, which provides that a conviction cannot be had upon the testimony of an accomplice without independent evidence connecting the defendant with the offense. Suffice it to say that the necessary corroborating evidence was offered. While petitioner might find the corroborating evidence somewhat wanting, the weight to be assigned it was for the jury and cannot now be considered. Ballard v. Howard, 403 F.2d 653 (6th Cir., 1968).

Accordingly, IT IS HEREBY ORDERED that the petition for writ of habeas corpus be and the same is denied.

NOTE: The above has been reviewed by this Court in light of the Supreme Court's decision in Dickey v. State of Florida, —— U.S. —— (May 25, 1970), and it is concluded that no changes are necessitated by that decision.

June 1, 1970

/s/ James F. Gordon
JAMES F. GORDON
United States District Judge

Copies to:

Willie Mae Barker, Petitioner
John B. Breckinridge, Attorney General,
Commonwealth of Kentucky

[Mailed 6/3/70, /s/ C. R.]

[Entered Jun. 3, 1970, August Winkenhofer, Jr., Clerk, By /s/ [Illegible], Deputy Clerk]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20662

WILLIE MAE BARKER, PETITIONER-APPELLANT

v.

JOHN W. WINGO, Warden, Kentucky State Penitentiary, RESPONDENT-APPELLEE

On Appeal from the U.S. District Court
for the Western District of Kentucky

Decided and Filed May 20, 1971

Before: WEICK, CELEBREZZE, and MCCREE, Circuit Judges

MCCREE, Circuit Judge. This case is an appeal from an order denying Willie Mae Barker's petition for a writ of habeas corpus. The question presented is whether appellant's Sixth Amendment right to a speedy trial was violated by the Commonwealth of Kentucky's five-year delay between indictment and trial. We hold that under the circumstances of this case appellant was not denied this constitutional right.

Appellant was indicted for the murder of Orlena Denton, one of two elderly persons who were beaten to death on September 15, 1958, and trial was originally set for October 21 of that year. The Commonwealth obtained 16 continuances which postponed the trial until October 9, 1963. During this entire five year period, appellant was represented by counsel. For about nine months after indictment, appellant was incarcerated; but from June

4, 1959, until his conviction in 1963, he was free on $5,000 bail.

Initially, the delay was occasioned by the Commonwealth's desire that the prosecution of appellant's alleged accomplice, Silas Manning, be first concluded. Apparently, the prosecution considered Manning's testimony essential to the prosecution of Barker. As counsel testified, Manning would have invoked his privilege against self-incrimination if he had been called to testify against Barker because he had not yet been tried and convicted of the two murders for which both had been indicted. Manning was eventually convicted of the two murders in separate trials concluded in March and December, 1962. Previous trials had resulted twice in hung juries and twice in reversals by the Kentucky Court of Appeals. *Manning* v. *Commonwealth*, 328 S.W.2d 421 (Ky. 1959); *id.*, 346 S.W.2d 759 (Ky. 1961). Ultimately, Manning testified for the prosecution at appellant's trial.

On February 12, 1963, appellant for the first time made objection to the delay of his trial and moved to dismiss the charges against him. The motion was denied, and shortly thereafter, on March 19, 1963, the Commonwealth asked for and was granted a further continuance because of the illness of a material witness, Sheriff Mckinney, who had investigated the Denton murders. Appellant was tried and convicted by a jury in October, 1963, in the first term of court after the Sheriff recovered.

Barker's conviction was affirmed by the Kentucky Court of Appeals, despite his claim that he had been denied his right to a speedy trial. *Barker* v. *Commonwealth*, 385 S.W.2d 671 (Ky. 1965). Appellant thereafter brought this action in the United States District Court for the Western District of Kentucky, which denied relief without an evidentiary hearing.

Whether delay between indictment and trial violates the constitutional right to a speedy trial depends upon the circumstances of each case. *Dickey* v. *Florida*, 398 U.S. 30 (1970); *United States v. Ewell*, 383 U.S. 116, 120-21 (1966); *Beaver* v. *Haubert*, 198 U.S. 77, 86-87 (1904). The mere lapse of time is not enough to consti-

tute a denial of speedy trial. *Von Feldt* v. *United States*, 407 F.2d 95 (8th Cir. 1969); *Carroll* v. *United States*, 392 F.2d 185 (1st Cir. 1968); *United States* v. *Beard*, 381 F.2d 325 (6th Cir. 1967). However, the length of time elapsed is obviously an important factor in determining whether this right has been violated. Here the total delay was five years. For four years and three months—from September 1958 to December 1962—the prosecution obtained continuances while it attempted to convict Manning. Appellant did not object to this delay until his motion to dismiss was filed on February 12, 1963.

We regard this motion to dismiss as a demand for a speedy trial,[1] but it is clear that the time before the motion was made should not be counted as part of the period of delay in determining whether the right was violated. *United States* v. *Lustman*, 258 F.2d 475, 478 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); *Kelley* v. *Kropp*, 259 F.Supp. 417, 419 (E.D. Mich. 1966).

The "demand rule"[2] provides that unless a defendant makes some attempt to resist postponement by the prosecution or demands immediate trial, he waives his Sixth Amendment right. *United States* v. *Jones*, 403 F.2d 498 (7th Cir. 1968); *United States* v. *Perez*, 398 F.2d 368 (7th Cir. 1968); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967) (5-year delay between mistrial of defendant and retrial does not violate the right to speedy trial where no demand was made); *Moser* v. *United States*, 381 F.2d 363 (9th Cir.), *cert. denied*, 389 U.S. 904 (1967); *United States* v. *Hill*, 310 F.2d 601 (4th Cir. 1962); *Bruce* v. *United States*, 351 F.2d 318 (5th Cir. 1965) (7-year delay did not violate right where no demand was made); *Hastings* v. *McLeod*, 261 F.2d 627 (10th Cir. 1968).

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[1] It would serve no good purpose to require defendant to file a formal demand for a speedy trial under these circumstances. The motion to dismiss made here is sufficient to meet the strict requirements of the "demand rule". *Cf. United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967).

[2] *See generally Annot.*, 129 A.L.R. 572, 587 (1940), 57 A.L.R.2d 302, 326 (1958), for a list of cases following the "demand rule".

The rationale behind the demand rule is that the right to a speedy trial is intended to serve "as a shield for the defendant's protection but not as a sword for his escape." *United States* v. *Maxwell*, 383 F.2d 437, 441 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967). An assumption seldom questioned in the corridors of criminal courts is that delay ordinarily favors the defendant. *But see Dickey* v. *Florida*, 398 U.S. 30, 49 (1970) (Brennan, J., concurring). Accordingly, when a defendant has counsel, his failure to request a speedy trial is understood to indicate that he prefers the limited restriction of bail to the possibility of the harsher restraint that may follow from conviction. Here, appellant may have thought his chances better if he silently accepted the many continuances sought by the prosecution to see if the Commonwealth would eventually convict Silas Manning. It was only after Manning was finally convicted that Barker sought a speedy trial.

Although a few recent cases and articles have suggested abandonment of the demand rule,[3] numerous courts have recently reaffirmed the rationale and vitality of this doctrine and have specifically refused to repudiate it. *See, e.g., United States* v. *Perez*, 398 F.2d 658 (7th Cir. 1968); *United States* v. *Maxwell*, 383 F.2d 437 (2d Cir.), *cert. denied*, 389 U.S. 1043 (1967). We agree

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[3] *Dickey* v. *Florida*, 398 U.S. 30, 48-50 (1970) (Brennan, J., concurring). *United States* v. *Mann*, 291 F.Supp. 268 (S.D. N.Y. 1968); *United States* v. *Richardson*, 291 F. Supp. 441 (S.D. N.Y. 1968). *See also* Cohen, *Speedy Trial for Convicts: A Reexamination of the Demand Rule*, 3 Val. L. Rev. 197 (1969). The rationale for eliminating the demand rule is twofold. First, it seems harsh to demand that a defendant, particularly if free on bail, initiate a process which may result in a substantial loss of freedom. (Here, appellant could have been sentenced to death on conviction.) Few defendants will make such a demand except when the prosecution's case is weak or weakened, as by absence of a key prosecution witness —which may be grounds for denial of the motion.

Second, the Supreme Court in recent decisions has been moving toward a position that constitutional rights cannot be waived unknowingly or inarticulately. The demand rule, which interprets inaction as waiver, is in conflict with this trend. *See Annot., supra* note 2; *Dickey* v. *Florida*, 398 U.S. 30, 49-50 (1970) (Brennan, J., concurring).

with the weight of federal authority,[4] and therefore we will consider only the period after February 12, 1963, in determining whether Barker's right to a speedy trial was violated. We hold that the remaining period of delay, from appellant's demand until the time he was brought to trial, October, 1963, was not unduly long. *United States* v. *Ewell*, 383 U.S. 116, 120-21 (1966).

More significantly, appellant has shown no prejudice resulting from this delay. There is no claim that during this eight-month period (or before) any witnesses became unavailable. Although appellant claims that certain defense witnesses' memories faded over the years, this assertion is not substantiated by the record. Appellant's witnesses testified with conviction and, in comparison with their testimony in the earlier Manning trials, without apparent mnemonic loss. Under these circumstances, appellant is not entitled to a discharge from custody. *United States* v. *Ewell*, 383 U.S. 116, 120-21 (1966); *United States ex rel. Solomon* v. *Mancusi*, 412 F.2d 88 (2d Cir. 1969). The only reason for delay following the demand was the unavailability of a material witness, Sheriff McKinney, due to illness.[5] Immediately following the witness' recovery the trial was commenced and diligently prosecuted.

The judgment of the District Court is affirmed.

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[4] *See Annot., supra*, note 2, and accompanying text.

[5] The unavailability of a key witness is usually held to be a valid reason for delay. *See, e.g., United States ex rel. Von Cseh* v. *Fay*, 313 F.2d 620 (2d Cir. 1963) (delay of 43 months after indictment justified since witness resided in India and could not be compelled by the state to return in order to testify).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20,662

[Filed May 20, 1971, Carl W. Reuss, Clerk]

WILLIE MAE BARKER, PETITIONER-APPELLANT

vs.

JOHN W. WINGO, Warden, Kentucky State Penitentiary,
RESPONDENT-APPELLEE

BEFORE: WEICK, CELEBREZZE and MCCREE,
Circuit Judges

JUDGMENT

Appeal from the United States District Court
for the Western District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded inasmuch as this appeal is in Forma Pauperis.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

SUPREME COURT OF THE UNITED STATES

No. 71-5255

WILLIE MAE BARKER, PETITIONER

v.

JOHN W. WINGO, Warden

On petition for writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 17, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 459331 539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,

Petitioner,

v.

JOHN W. WINGO, Warden,
Kentucky State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file the attached brief amicus curiae in this case. The consent of the attorney for petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Lawyers' Committee for Civil Rights Under Law in this case arises from the potential significance that a decision will have on the serious and growing problem of the systematic denial of the constitutional right to a speedy trial in the courts of this country because of docket congestion and other administrative difficulties.

In his petition for writ of certiorari, petitioner dealt primarily with the specific requirements of demand and

prejudice in asserting the constitutional right to a speedy trial. We believe that the decision in this case will affect the broader issues of the consequences of the denial of a right to a speedy trial for the administration of justice, the individual and society. The brief which amicus curiae is requesting permission to file will contain a more complete argument with regard to the constitutional and practical dimensions of this issue.

The Lawyers' Committee further respectfully moves for leave to present oral argument before this Court as amicus curiae.

Respectfully submitted,

Thomas D. Barr

Thomas D. Barr

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1 Chase Manhattan Plaza
New York, N. Y. 10005

March 2, 1972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,

Petitioner,

v.

JOHN W. WINGO, Warden, Kentucky State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

This brief is submitted amicus curiae on behalf of The Lawyers' Committee for Civil Rights under Law whose appearance as amicus curiae is moved in an accompanying petition. That appearance has been consented to by petitioner.

Opinions Below

The opinion of the United States District Court for the Western District of Kentucky has not been reported but is attached to defendant's Petition for Writ of Certiori as Appendix 1. The opinion of the United States Court of

Appeals for the Sixth Circuit affirming the decision of the District Court is reported at 442 F. 2d 1141 (1971).

Jurisdiction

The judgment of the Court of Appeals was entered on May 20, 1971. The petition for a writ of certiorari was filed on August 16, 1971, and certiorari was granted on January 17, 1971. The jurisdiction of this Court is based on 28 U. S. C. § 1254(1) (1970).

Question Presented

Is delay of more than five years between arrest and trial, caused solely by the Commonwealth of Kentucky, a deprivation of the Sixth Amendment right to a speedy trial?

Statutes Involved

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence." U. S. Const. amend. VI.

Facts

A. Facts Relating to the Delay in the Trial of Willie Mae Barker

Willie Mae Barker was tried on October 9, 1963, and convicted for a murder which allegedly had been commit-

ted on July 20, 1958, almost 5 years and 3 months earlier. Petitioner and his alleged accomplice, Silas Manning, were arrested shortly thereafter and petitioner was indicted on September 15, 1958. Trial was originally set for October 16 of that year, but the Commonwealth obtained a series of 16 continuances which postponed the trial for over 5 years. During all but 9 months of that period, petitioner was free on $5,000 bail.

Petitioner was not responsible for any of this delay. Each continuance was requested by the Commonwealth. Originally the continuances were sought to allow the accomplice Manning to be tried.* An additional continuance was sought because of the sickness of the sheriff who had investigated the murders. In February 1962 or 1963** petitioner moved to dismiss the indictment against him because of the delay. This motion was denied.

Thus Barker did not cause the delay in his trial nor did he expressly waive his right to a speedy trial. The delay was for the benefit of the prosecution and the result was conviction for murder.

Unfortunately, that sorry tale of justice delayed and denied is typical and in many courts it may accurately be said to be the rule.

B. Facts Relating to the Magnitude of Delay Generally

> "Congestion in the trial courts of this country, particularly in urban centers, is currently one of the major problems of judicial administration. Notwithstanding the usual rule that criminal cases have

*Manning was tried six times. Two convictions were reversed by the Kentucky Court of Appeals before Manning was convicted of each murder, in March and December 1962.

**According to petitioner's brief, the record indicates the motion was made in 1962. Both the opinion of the District Court and the opinion of the Sixth Circuit give the date as 1963.

> priority over civil cases, this congestion has created serious difficulties for the administration of criminal justice. The continued pressures upon existing resources have been such that it is extremely difficult to dispose of all criminal cases with promptness and with due regard for fair procedures." AMERICAN BAR ASSOCIATION. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL 1 (Approved Draft 1968) (hereinafter "ABA SPEEDY TRIAL STANDARDS").

That restrained statement of the American Bar Association indicates the growing concern with what has become a critical problem in the administration of criminal justice. At a time when it seems unusually important that public confidence in the criminal justice system be sustained, the problem of trial delay, and the resulting congested calendars, crowded jails and confused, assembly-line "justice", may dispassionately be labeled a crisis.

Various statistical studies give some indication of the numerical magnitude of the problem. They, of course, do not adequately reflect the human suffering and confusion which lie behind those numbers. They also do not reflect the perceived threat to public safety which the release and lengthy continued freedom of persons indicted and awaiting trial for serious crimes represents or the spreading concern with the ability of the criminal justice system to perform its tasks.

(i) The Federal Courts

On June 30, 1970, 20,910 criminal cases were pending in the United States district courts of which 6,179 or 30% had been pending more than one year. The Judicial Conference of the United States resolved that these cases should be regarded as a "judicial emergency by all judges". AN-

NUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1970, at 155-156 (hereinafter "1970 ANNUAL REPORT OF THE DIRECTOR"). Further, 52% of these pending cases involved fugitive defendants. *Id.* at 157. Despite the declaration of a judicial emergency, the situation is not improving. As of June 30, 1971, there were 8,690 criminal cases which had been pending more than one year (26% of the total pending) of which 4,535 or 52% involved fugitive defendants. This is an increase of over 2,500 or 41% in total cases pending more than one year from 1970 to 1971. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS FOR THE FISCAL YEAR ENDED JUNE 30, 1971, at II-89 (hereinafter "1971 ANNUAL REPORT OF THE DIRECTOR"). In certain urban districts, the statistics are worse. Forty percent of all criminal cases in the Southern District of New York have been pending more than one year, although only 15.5% of these involve fugitive defendants. *Id.* at II-87. In the District of Columbia 23% of the 2,286 cases pending have been pending more than one year, but 52% have been pending more than six months.* *Id.* at II-87. In the Eastern District of Michigan 33% of all pending criminal cases have been pending more than one year and in New Jersey 29.1% have been pending more than a year. *Id.* Indeed in the federal system there are 83 cases awaiting trial which do not involve fugitive defendants which have been pending for more than 5 years! *Id.* at II-85.

The total number of criminal cases pending has been increasing by an average of 18% a year since 1968. The

*Only 7.1% of those cases pending more than six months but less than a year involve fugitive defendants whereas 24.4% of those pending more than a year involve fugitive defendants. This increase of 344% is itself alarming because it suggests that length of delay increases the number of fugitives.

average increase in those cases pending more than a year has been 21.8% during that time period. *Id.* at II-84. On the federal level, therefore, the problem is of continuing and growing significance.

(ii) The State Courts

The problem of delay in New York state courts became so acute by 1970 that drastic action was needed. At the end of 1968 the total non-traffic criminal backlog in New York City alone was 520,000 cases. (Twenty-five percent of the 480,930 new cases entering the system in 1968 were serious crimes, felonies and arrested misdemeanors). N. Y. C. CRIMINAL JUSTICE INFORMATION BUREAU, REPORT TO THE MAYOR'S CRIMINAL JUSTICE COORDINATING COUNSEL, THE NEW YORK CITY CRIMINAL COURT: CASE FLOW AND CONGESTION FROM 1959 TO 1968, at A-12 (1970) (hereinafter "CJIB CONGESTION REPORT"). At April 1, 1970, in New York City, there were 8,146 defendants detained prior to trial, 2,270 of which had been in jail for more than three months. Brief for the Mayor of the City of New York as Amicus Curiae at 5, United States ex rel. Frizer v. McMann, 437 F. 2d 1312, *aff'g en banc* 437 F. 2d 1309 (2d Cir.), *cert. denied*, 402 U. S. 1010 (1971). In all of New York State there were 2,899 defendants who had been in jail more than 3 months, 437 F. 2d at 1314. In part these massive delays and the resulting overcrowding of detention facilities such as the "Tombs" in New York City led to the widely publicized riots which began in August 1970. *See, e.g.*, N. Y. Times, August 11, 1970, at 1, col. 1.

Action taken in New York in response to these problems included the appointment of a new judicial administrator for the New York Criminal Court System who established a system of penalties for excessive pre-trial delay. N. Y. Times, February 21, 1971, at 44, col. 4, and the adoption of speedy trial rules by the New York Court of Appeals to be-

come applicable in the spring of 1972. New York Law Journal, April 30, 1971, at 1, col. 8. *See* p. 23 *infra*. Those reforms led to a dramatic decrease in the number of cases pending in the Criminal Court, where lesser crimes are prosecuted and where the rules are actually in effect, from 59,000 at January 1, 1971, to 27,816 at July 1, 1971, but the number of cases pending in the New York Supreme Court where felonies are prosecuted and where the rules were not yet in effect increased 23% from 6,494 in 1970 to 8,010 at June 30, 1971. N. Y. Times, August 4, 1971, at 1, col. 3. Thus in New York as well, the problem continues to be of growing significance.

New York can be seen as an example, albeit perhaps the most extreme one, of a problem that is general throughout the urban centers of this country. In California, for example, which has a strong statutory requirement of trial within a maximum of 60 days for serious offenses except upon a showing of good cause (Cal. Penal Code § 1382), the median time from indictment to judgment was 2.6 months in 1969. Even so, 10% of all cases or 4,874 took more than six months. In Los Angeles the median time from indictment to disposition by jury trial for the first half of 1970 was 124 days. For San Francisco it was 186 days. *Speedy Trial in Criminal Cases,* 46 CAL. ST. B. J. 649, 650 (1971). In New Jersey, there were 14,701 cases pending as of August 31, 1970, an increase of 19% from a year earlier. REPORT OF THE ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF NEW JERSEY, FOR THE COURT YEAR 1969-1970, Table D-8. In Michigan 5.9% of the 11,726 criminal cases pending at the end of 1969 had been pending for more than two years. ANNUAL REPORT, SUPREME COURT OF MICHIGAN, JUDICIAL STATISTICS FOR 1969, at 72-74.

Similarly, a comparison of the statistics on delay for the Southern District of New York with other districts suggests

that it is not the worst. 1971 ANNUAL REPORT OF THE DIRECTOR, at II-87. At least two other courts have had more cases pending for over a year and 9 others have a substantial number of such cases. Undoubtedly the situation in the state courts in these jurisdictions must be similar to the problem in New York. The rash of speedy trial cases reaching the federal appellate courts after the decision in *Dickey* v. *Florida*, 398 U. S. 30 (1970), gives another clue as to the dimensions of the problem. *See* pp. 32-33 *infra*.

Summary of Argument

The backlog of criminal cases in many state and federal courts of this country is so large that an immediate solution is required. To make a solution possible and to discharge its constitutional obligation, this Court should declare that the Sixth Amendment requirement of a speedy trial must be read as providing generally in both federal and state courts that each criminal case must be tried within a fixed period of time after arrest.

We contend that the consequences of the existing delay seriously undermine confidence in the judicial process at a time when such confidence is vitally important to our society. Obviously, denial of the right to a speedy trial deprives individuals of a constitutionally guaranteed fundamental right. In addition, the costs to society of persons awaiting trial in diversion of resources and in the brutalization resulting from incarceration in the ghastly dens which our jails have become are costs we cannot afford. Equally intolerable is to have persons accused of serious crimes roaming at large for substantial periods of time while they await trial or, as is the fact in many thousands of cases, simply disappearing before those cases can be tried.

Many solutions are offered to the problems of denial of a speedy trial. Proponents of one category of solution

advocate the necessity for more judges, more prosecutors, more courtrooms; indeed more of everything. A number of national study commissions made up in major part of prominent participants in the criminal justice system—urge more efficient use of existing resources. In addition, broader plans have been put forth for the total reform of the entire criminal justice system. Those solutions are viable. It is the will that is lacking. We believe this Court can and should provide the impetus to make the necessary changes.

Our research of both ancient and modern precedent indicates that the pressure of court congestion has led some courts to back away from the guarantee of the Constitution or to hedge in the right to a speedy trial with seemingly unjustified conditions. In a separate historical appendix we demonstrate that, through Lord Coke's analysis of Magna Carta and the engrafted right of habeas corpus, the fundamental guarantee of a speedy trial was transmitted from medieval England to the American colonies, the Federal Constitution and the early state practice. Although this Court has repeatedly made clear that the Sixth Amendment's requirement of a speedy trial is not to be limited by expense or inconvenience, some courts have accepted what they deem to be practicalities as justification for denying defendants the right to a speedy trial. It seems plain that denying the right to a speedy trial by finding implied waivers of the right or by requiring that defendants demonstrate prejudice at trial are both not workable and not permissible within the plain meaning of the Sixth Amendment.

Several appellate courts have recently expressed serious concern about the growing backlog in our urban centers. On January 5, 1971, the Court of Appeals for the Second Circuit adopted a new set of rules governing the right to a speedy trial. Those rules generally require a trial in every case within six months after indictment. We believe

that the Sixth Amendment requirement of a speedy trial may be satisfied by rules similar to those adopted by the Second Circuit.

It is, of course, this Court's obligation to declare what the Constitution means. The speedy trial requirement in the Sixth Amendment clearly means that a defendant must be offered trial within a fixed period of time and that the wherewithal to make that offer a reality must be supplied by the state or federal government. The Court cannot choose the method by which the existing system may be reformed nor can it administer the implementation of that reform. It can and must, both constitutionally and practically, announce in unambiguous terms that a system which does not provide a criminal trial within a fixed period of time is not constitutionally permissible.

If the Court concludes that an immediate implementation of such rules would be unworkable, a transition period may be necessary and desirable.

Argument

I

THE CURRENT BACKLOG AND DELAY IN THE CRIMINAL COURTS BREEDS DISRESPECT FOR THE CRIMINAL JUSTICE SYSTEM, CAUSES LOSS OF INDIVIDUAL RIGHTS AND DANGER FOR SOCIETY.

A. Consequences of Delay for the Administration of Justice

Delay and the case backlog impair the proper administration of justice.

> "Swift and certain justice is a virtually unchallenged goal. Witnesses should be heard promptly while their recollections are clear. Innocent persons

> should not remain in jail for substantial periods of time pending trial. Guilty persons should not profit from tardy court processes, which postpone final adjudication and provide an opportunity for committing additional offenses while awaiting tral." REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 255-56 (1966) (hereinafter "D. C. CRIME COMMISSION REPORT").*

For those who can afford it and know how the system works, it takes little skill and less effort to remain free.

> "When the backlog is large, the defendant on bail is assured of considerable time before there is a realistic trial date, at which time he may plead guilty exactly as he might have done months earlier, or he may seek a continuance which is often granted by a court cognizant of other defendants who are ready to proceed to trial. This serves to further congest the calendar with pending cases which might have been terminated but for the opportunity of delay due to the existing backlog." *Id.* at 256.

Not only may he "plead guilty exactly as he might have done months earlier", but because he knows the rules his position at the plea-bargaining session is excellent. According to N. Y. Times, March 28, 1970, at 29, col. 1, "The courts are so crowded, they [New York City District Attorneys] say, that they fear they will not be able to win a conviction after trial, that delays are so long that by the time the trial begins, the witness may be gone. Thus they 'bargain' with defend-

*Members of the D. C. Crime Commission were Herbert J. Miller, Chairman, Marjorie M. Lawson, Vice Chairman, Frederiek A. Ballard, Donald S. Bittinger, C. Clyde Ferguson, Jr., Abe Krash, David A. Pine, William P. Rodgers and Patricia M. Wald. The Executive Director was Howard P. Willens, former First Assistant, Criminal Division, United States Department of Justice.

ant to agree to a lesser charge to which the defendant can plead guilty." In New York City in 1970, 80% of all felony charges were reduced or dismissed and only 7% went to trial *Id.* In many jurisdictions the percentage of guilty pleas is 90%. J. E. Lumbard, *Trial by Jury and Speedy Justice,* 28 WASH. & LEE L. REV. 307 (1971). In Washington, D. C. in 1966, 38% of those arrested were pleading guilty to lesser offenses, a rise of 55% from 1950. D. C. CRIME COMMISSION REPORT, *supra* at 253. Plea bargaining thus becomes a necessity because prosecutors, judges, courtrooms and defense counsel are too few to staff the number of possible trials. *See also Speedy Trial in Criminal Cases,* 46 CAL. ST. B. J. 649, 653 (suggesting mandatory plea bargaining as a partial solution to the problem of pre-trial delay).

Those cases which do run the blockade of delay are stale by the time they are eventually tried. Each party's case becomes more vulnerable to cross-examination and less persuasive to the jury. Defenses like insanity become very difficult to prove. Witnesses may be unable to remember precise details of events. *See, e.g., United States* v. *Chase,* 135 F. Supp. 230, 233 (N. D. Ill. 1955). Other witnesses simply become unavailable. *United States* v. *Parrott,* 248 F. Supp. 196, 204-05 (D. D. C. 1965); *United States* v. *Provoo,* 17 F. R. D. 183, 203 (D. N. D.), *aff'd mem.,* 350 U. S. 857 (1955). Indeed some potential witnesses, aware of the delay in the court system, refuse to become witnesses in the first place. D. C. CRIME COMMISSION REPORT, *supra* at 279. In addition, documents or physical evidence may deteriorate or be lost. *Dickey* v. *Florida,* 398 U. S. 30, 42 (1970) (Brennan, J. concurring). And for those who ultimately are tried and convicted, the delay between indictment and conviction lessens the deterrent, retributive and corrective value of any conviction. *See, e.g.,* J. BENTHAM, THE THEORY OF LEGISLATION 326 (Ogden ed. 1931); E. BANFIELD, THE UNHEAVENLY CITY 177-78 (1970).

B. Consequences of Delay for the Individual

To all of the foregoing, which impinges directly upon the administration of justice itself, must be added the consequences for the individual defendant and for society as a whole. As reported in THE CHALLENGE OF CRIME IN A FREE SOCIETY, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 154 (February 1967) (hereinafter "CRIME COMMISSION REPORT")*:

> "It is clearly unfair to a defendant to jail him for months without trial; it is clearly unfair to the community for a defendant charged with a serious crime to be at large for months without trial. . . ."

The most obvious consequence for the individual defendant and that most destructive to his personal life is jail. Jail—labeled by the recent report of the National Commission on the Causes and Prevention of Violence as "often the most appalling shame in the criminal justice system"—means loss of a job,** disruption of family life with resulting domestic relations problems, individual psychological trauma and anxiety, loss of liberty, enforced idleness and

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*Members of the Crime Commission were Nicholas deB. Katzenbach, then Attorney General of the United States, Genevieve Blatt, Charles D. Breitel, Kingman Brewster, Garrett H. Byrne, Thomas J. Cahill, Otis Chandler, Leon Jaworski, Thomas C. Lynch, Ross L. Malone, James B. Parsons, Lewis F. Powell, Jr., William P. Rogers, Robert G. Storey, Julia D. Stuart, Robert F. Wagner, Herbert Wechsler, Whitney M. Young, Jr. and Luther W. Youngdahl. The Executive Director was James E. Vorenberg, Professor of Law at the Harvard Law School and first head of the Law Enforcement Assistance Administration and the Deputy Director was Henry E. Ruth, now Director of the Mayor's Criminal Justice Coordination Council in New York City.

**Recognition of this fact in Massachusetts led to a provision that those detained more than six months shall receive compensation for the period of detention beyond six months if acquitted or discharged without trial. Mass. Gen. Laws Ann. ch. 277, § 73.

public suspicion. FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 132 (1969) (hereinafter "VIOLENCE COMMISSION REPORT").*

In addition, jail severely hampers a defendant's ability to prepare his case. He cannot contact witnesses, freely communicate with his attorney or otherwise gather evidence. The inability on the part of a defendant to prepare his case adequately while in jail is reflected in the number of those detained before trial who are imprisoned after trial. Fifty-nine percent of those who were detained between indictment and trial went to prison, while only 22% of those not detained did. LAW AND ORDER RECONSIDERED, A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 435-36 (1969) (hereinafter "LAW AND ORDER RECONSIDERED"). That difference cannot be correlated with other differences in the backgrounds of the accused. Wald, *Pre-Trial Detention and Ultimate Freedom: A Statistical Study*, 39 N. Y. U. L. REV. 631 (1964).

Bail, another alternative, is also an unsatisfactory solution. In the first place it discriminates against the poor. In New York where the bondsman's fee is 5% (it is 10% in many other places), 25% of those placed on a bail of $500 could not post the bond. Forty-five per cent of those with bail of $1,500 and 63% with bail of $2,500 could not post it. CRIME COMMISSION REPORT, *supra* at 131. Nonetheless, 60% of those in New York City's 'Tombs" had their bail set in excess of $1,750. N. Y. Times, September 2, 1969, at 40, col. 1. In Washington, D. C., only 58%

*Members of the Violence Commission were: Dr. Milton S. Eisenhower, Chairman, Congressman Hale Boggs, Cardinal Terence J. Cooke, Ambassador Patricia Harris, Sen. Philip A. Hart, Judge A. Leon Higginbotham, Eric Hoffer, Senator Roman Hruska, Leon Jaworski, Albert E. Jenner, Jr., Congressman William C. McCulloch, Judge Ernest W. McFarland and Dr. W. Walter Menninger.

could pay the bail which was set. D. C. CRIME COMMISSION REPORT, *supra* at 505.

In addition, even those who are free on bail are subject to possible loss of job, public suspicion, personal anxiety and disruption of family similar if not quite in the same degree as one in jail. The longer the period between arrest and trial, the more severe the effect.

Personal recognizance is only a partial solution. First, personal recognizance is an even less available means of gaining freedom than bail. In New York, of those investigated by the Office of Probation, only 27% were permitted their liberty. VERA INSTITUTE OF JUSTICE, A REPORT TO THE MAYOR'S CRIMINAL JUSTICE COORDINATING COUNSEL, THE PROBLEM OF OVERCROWDING IN THE DETENTION INSTITUTIONS OF NEW YORK CITY: AN ANALYSIS OF CAUSES AND RECOMMENDATIONS FOR ALLEVIATION 28 (1969) (hereinafter "VERA DETENTION REPORT"). And secondly, as this Court explicitly recognized in *Klopfer* v. *North Carolina*, 386 U. S. 213, 221-22 (1967), personal recognizance solves only the one financial problem of ability to post bail. *See People* v. *Prosser*, 309 N. Y. 353, 356, 121 N. Y. S. 2d 574, 130 N. E. 2d 891 (1955).

Thus it is apparent that delay in the criminal courts of this country works a substantial deprivation of an individual's civil liberties and human rights without any adjudication of his guilt or innocence.

C. Consequences of Delay for Society

Were that not cause enough for serious concern, the consequences for society of jail or bail for extended pretrial periods are perhaps even more disquieting. From society's viewpoint, jailing the accused for prolonged periods is both expensive and likely to result in magnifying criminal tendencies. Release for substantial periods, on the

other hand, exposes society unnecessarily to the risk of repeated offenses.

As we know, our system of correctional institutions is in a deplorable state. *See, e.g.*, VIOLENCE COMMISSION REPORT, *supra* at 152; LAW AND ORDER RECONSIDERED, *supra* at 576-85; K. MENNINGER, THE CRIME OF PUNISHMENT (1968). How much worse then are our detention facilities, even in the best of times, which are designed merely as way stations, not as ultimate repositories for the convicted. It is rare to find any rehabilitative program being conducted in the jails; in fact, less than 3% of the total staff of the nation's 3,500 jails have any rehabilitative responsibilities. LAW AND ORDER RECONSIDERED, *supra* at 574.

In the words of the former Director of the United States Bureau of Prisons:

> ". . . [T]he typical jail has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult. . . . [T]he typical jail is dirty and overcrowded. The food is deplorable, supervision is scant, and there are no programs for self-improvement, or even for health and recreation. The typical jail has little to inspire the prisoner and much to demoralize him. The result is that he must spend his time there vegetating and degenerating and worse. . . . Unnecessary jail detention, in my opinion, is . . . a factor accounting for failure among those released on probation and even among those who are eventually freed of their current charges." *Hearings before Sen. Subcomm. on Constitutional Rights*, 88th Cong., 2d Sess., at 46 (testimony of James Bennett, former Director of the United States Bureau of Prisons) quoted in LAW AND ORDER RECONSIDERED, *supra* at 436-37.

Nor is this the best of times. Backlog and delay have caused severe overcrowding of already inadequate and antiquated facilities. VERA DETENTION REPORT, *supra* at 23. The New York City "Tombs" has a normal male detention capacity of 2,177. By September 1969, there were 6,613 defendants detained awaiting trial in the "Tombs". N. Y. Times, September 2, 1969, at 40, col. 1. Some attempt to remedy this problem was made by assigning 2,000 prisoners to be lodged on Rikers Island with convicted and sentenced offenders. This still left the Tombs at 211% of capacity. In August of 1970 a series of riots began in the "Tombs" because of this overcrowding and because of the delay between arrest and trial. *See, e.g.*, N. Y. Times, October 3, 1970, at 1, col. 8. A National Jail Census conducted in 1970 by the United States Department of Justice indicated that as of March 15, 1970, local jails throughout the United States held a total of 160,863 inmates of which 52% or 83,079 were pre-trial detainees. For those jails designed to hold 300 or more persons, more than 30% were overcrowded. NATIONAL JAIL CENSUS, UNITED STATES DEPARTMENT OF JUSTICE 1 (February 1971).

Sustained pre-trial detention in overcrowded facilities, which are at best cages designed for a few days confinement, with hardened criminals for companions, leads to a brutalization of the accused.* See N. Y. Times, April 8, 1970, at 45, col. 1.

> "An imprisoned defendant is subject to the squalor, idleness, and possibly criminalizing effects of jail. He may be confined for something he did not

*Incarceration in detention facilities rather than correctional facilities for any appreciable length of time without an adjudication of guilt is arguably cruel and unusual punishment in contravention of the Eighth Amendment of the Constitution of the United States. See, e.g., Trop v. Dulles, 356 U. S. 86, 100 (1958); Robinson v. California, 370 U. S. 660, 667 (1962).

> do; some jailed defendants are ultimately acquitted. He may be confined while presumed innocent only to be freed when found guilty; many jailed defendants, after they have been convicted, are placed on probation rather than imprisoned." CRIME COMMISSION REPORT, *supra* at 131.

Such an operation stands the criminal justice system on its head: an accused is confined prior to trial, tried and then released. Regardless of his original guilt or innocence, the accused has been punished and in the process forceably introduced to crime and criminals. The individual who emerges cannot help but be more cynical, more brutal and more likely to commit a crime than when he was arrested.

Finally, this inadequate and perverted system for the control of those accused of crimes is very expensive for society. Depending on the location of the detention facilities, the cost is from $3 to $9 a day per prisoner.* *Id.* For New York City this would mean close to $25,000,000 a year (assuming $10/day, times 365 days, times 6,613 prisoners, equals $24,137,750) or nearly half the amount spent on the Criminal Court and all five Supreme Courts in New York City including the Civil Term. CJIB CONGESTION REPORT, *supra* at A-11. Indeed this figure would be higher if the appropriate reforms were made to the detention facilities. LAW AND ORDER RECONSIDERED, *supra* at 458.

Release while awaiting trial is also not a satisfactory solution. Any release program which involves an extended period of freedom between arrest and trial poses a danger to society. Our system of crime control is based on the assumption that crime leads to arrest which is promptly followed by trial and punishment. Extensive delay creates

*This excludes lost wages which society is usually compelled to make up in welfare or other public assistance.

a system where crime is followed by arrest, release, more crime and only perhaps after rearrest trial and punishment. The number of those released on bail reported as committing crimes varies from 34.6% to 7.46%. District of Columbia Police Department Study, as reported in LAW AND ORDER RECONSIDERED, *supra* at 447; D. C. CRIME COMMISSION REPORT, *supra* at 515. The latter figure is probably a minimum. Moreover, the same study reveals that a significant number of those on bail committed felonies, and 80% of them committed felonies as serious or more serious than the ones for which they were originally arrested. *Id.* at 518. What is even more directly important for this case, delay seems clearly to exacerbate the problem. Sixty-eight per cent of all the crimes committed by those on bail were committed more than 30 days after arrest and 45.5% more than 60 days after arrest. D. C. CRIME COMMISSION REPORT, *supra* at 519. The D. C. Crime Commission therefore recommended trial within 30 days of those considered dangerous. *Id.* at 525-26.

Another study shows that of 557 persons indicted for robbery in 1968 in the District of Columbia, 70.1% of those released prior to trial were rearrested while on bail. A sample of those rearrested indicated 82.1% were convicted of the crime they were charged with committing while on bail. REPORT OF THE JUDICIAL COUNCIL COMMITTEE TO STUDY THE OPERATION OF THE BAIL REFORM ACT IN THE DISTRICT OF COLUMBIA 20-21 (May 1969) as reported in John N. Mitchell, *Bail Reform and the Constitutionality of Pre-trial Detention,* 55 VA. L. REV. 1223, 1236 (1969). As the then Attorney General pointed out in that article, even those statistics significantly understate the problem because arrests are made in less than 15% of all crimes committed and pre-trial release is ordinarily denied to those considered dangerous. *Id.* at 1237.

In addition as is pointed out in the 1971 ANNUAL REPORT TO THE DIRECTOR, fugitive defendants have become an ever more significant problem in federal criminal cases. "Violations relating to escape from custody, aiding and abetting escape, failure to appear in court, and bail jumping, have moved upward from 238 in 1961 to 1,245 in 1971—a jump of 423 percent." At II-60. Fifty-seven percent of all cases pending more than a year involved fugitive defendants who numbered 4,533. *Id.* at II-83, II-85.

In the instant case an individual indicted for a brutal murder for which he was ultimately convicted roamed free on $5,000 bail for almost 4½ years. Not only are the deterrent, retributive and corrective values of trial and punishment diminished drastically by such a delay, but those innocent members of the community where the crime was committed can have little faith in a system that permits an ultimately convicted felon his freedom for over 4 years.

Both the Bail Reform Act, Pub. L. 89-465, 80 Stat. 214 (1966), and the concept of preventive detention find genesis in the failure to provide speedy trials. Both attack, we believe, the wrong problem. They are put forth as solutions to the problem of what to do while waiting, especially over an extended period, for a trial. They treat a symptom, not the disease. The disease is the delay itself, and until it is cured the symptoms can be only temporarily relieved not eliminated.

II

VIABLE SOLUTIONS TO THE PROBLEM OF DELAY EXIST.

The problems of delay and backlog in the criminal courts of this country are not unsolvable, nor are they problems which have gone unstudied. Both studies and proposed solutions abound. The solutions fall roughly into three categories.

The first category of solution is that which involves more judges, more courtrooms, more prosecutors and more defense attorneys; in short, more money. To achieve that result something must be done to stimulate a willingness on the part of legislatures to allocate appropriate funds. We believe the necessary result of this case—a declaration by the Court of the constitutional requirement of a speedy trial—would go far in that direction.

The second category of solution, and one without which a substantial dose of the first category would probably not succeed, is a reform in the management of the court system. The CRIME COMMISSION REPORT contains a model timetable for various stages of a criminal proceeding which would result in a trial within four months of arrest and a complete disposition of the case within nine months, and it contains suggestions for its implementation. CRIME COMMISSION REPORT, *supra* at 154-56. *See also* TASK FORCE REPORT: THE COURTS 89-96 (1967). The feasibility of such a system has been demonstrated by experimental simulation on a computer. CRIME COMMISSION REPORT, *supra* at 258-59. The D. C. CRIME COMMISSION REPORT outlines a system to process cases within an eight-week period. D. C. CRIME COMMISSION REPORT, *supra* at 269-70. The ABA Project on Minimum Standards of Criminal Justice suggests a complete set of specifications for the orderly preservation of the right to a speedy trial. ABA SPEEDY TRIAL STANDARDS, *supra* at 5-9. Numerous studies have made other recommendations for substantial improvement in court management. *See, e.g.*, NORTH AMERICAN ROCKWELL INFORMATION SYSTEMS COMPANY, A MANAGEMENT AND SYSTEMS SURVEY OF THE UNITED STATES COURTS at I-3—I-5 (1969); LAW AND ORDER RECONSIDERED, *supra* at 509-24; and TASK FORCE REPORT: THE COURTS, *supra* at 80-96.

Significantly most of those studies and recommendations start from the premise that there is a specified period within which an accused must be brought to trial. The ABA Standards are most explicit in making this an absolute requirement.

> "A defendant's right to speedy trial should be expressed by rule or statute in terms of days or months running from a specific event." ABA SPEEDY TRIAL STANDARDS, *supra* at 6.

This is the one essential component of any viable solution to the problem. It has been adopted in states which have dealt with the problem.* In California, as has already been indicated, failure to afford trial within 60 days of indictment entitles the defendant to an absolute discharge. Cal. Pen. Code § 1382.

On January 5, 1971, in connection with an en banc rehearing of *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1309, *aff'd en banc*, 437 F. 2d 1312 (2d Cir.), *cert. denied*, 402 U. S. 1010 (1970) the Second Circuit announced a series of rules "Regarding Prompt Disposition of Criminal Cases" in an attempt to deal with the enormous and growing problem recognized in *Frizer* of the systematic denial of speedy trials. Those rules provide in essence that in the case of detained defendants, the government must be ready for trial in 90 days or the defendant must be released upon bond or personal recognizance (¶ 3). In all cases, the government must be ready for trial within 6 months or the charges will be dismissed on motion of the defendant (¶ 4). Certain ameliorating provisions are included which exclude delay caused by the defendant and allow for prosecutorial continuances in extenuating cir-

*For a collection of those states see ABA Speedy Trial Standards, *supra* at 14, and Klopfer v. North Carolina, 386 U. S. 213, 220 n. 4 (1967).

cumstances (¶ 5). Nonetheless, the clear intent of the rules is to require readiness for trial within 6 months and the penalty is dismissal of the charges without a demonstration by the defendant of prejudice or prior demand. Appropriately the burden of speed is placed squarely on the government.

Those rules were adopted pursuant to 28 U. S. C. § 332 (1971) and therefore have no applicability to state courts within the jurisdiction of the Second Circuit. Nonetheless, the message to the state courts was clear, and on April 30, 1971, Chief Justice Stanley H. Fuld of the New York Court of Appeals, announced that the Administrative Board of the Judicial Conference of the State of New York had adopted speedy trial rules which would be applicable to all New York courts. New York Law Journal, April 30, 1971, at 1, col. 8. Those rules, which are to become effective on May 1, 1972, provide for similar periods between indictment and trial. The New York rules are even more stringent, however, in that they provide that not only must the government be ready for trial within the 90 days or six months, but also that the case must in fact go to trial within those periods. The New York rules also have similar ameliorating provisions. Although there has been some question as to whether sufficient funds will be made available to implement the New York rules, *see, e. g.*, N. Y. Times, November 21, 1971, at 84, col. 4, these rules, if properly implemented, promise a satisfactory solution to the problem.

The third category of solution involves an overall reform of the criminal justice system. The Violence Commission has suggested a program of coordinated study and experimentation which would lead to a modernized criminal justice system. VIOLENCE COMMISSION REPORT, *supra* at 156-67.

However, absent an authoritative statement of what the permissible time period between arrest and trial is, none of the foregoing solutions will be adopted. Neither the problem nor the studies are new. Trial delay has been recognized as substantial since at least the mid-1950's. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION, DEPARTMENT OF JUSTICE, MAY 21-22, 1956, at 162. PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION, DEPARTMENT OF JUSTICE, JUNE 16-17, 1958, at 245. Some real efforts have been undertaken in the last few years to solve some of the problems of delay. In order to make those solutions possible it must be clear that this Court will require the speedy trial requirement of the Sixth Amendment to be honored by the courts. Viable solutions will then be adopted, funded and put into effect.

III

ALTHOUGH THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL IS UNAMBIGUOUS AND GROUNDED IN ANCIENT FUNDAMENTAL PRINCIPLE, IT HAS BEEN DENIED IN MANY CASES, OFTEN BY THE INEXORABLE RESULTS OF COURT CONGESTION.

Despite more than 700 years of Anglo-American jurisprudence guaranteeing the right to a speedy trial, some contemporary courts have excused unjustified delay on grounds of court congestion, implied waiver by the defendant and lack of prejudice at time of trial. Recent state and federal decisions have affirmed in general terms the right to a speedy trial, but in fact criminal defendants are regularly denied that right.

A. The Sixth Amendment recognized the traditional Anglo-American legal requirement that those charged with crimes be quickly tried.

That the right to a speedy trial "is one of the most basic rights preserved by our Constitution", *Klopfer* v. *North*

Carolina, 386 U. S. 213, 226 (1967), (quoted in *Dickey* v. *Florida*, 398 U. S. 30, 37 (1970)) can be seen clearly from a review of the background of the Sixth Amendment.*

From the Assize of Clarendon in 1166, the Magna Carta in 1215 and later medieval practice the right to a speedy trial has been part of traditional fundamental guarantees. The American colonists relied heavily on those direct English antecedents and particularly on Lord Coke whose SECOND INSTITUTE was the authoritative statement of the principles of Magna Carta in both England and in America. Lord Coke's famous statement "that Justice must have three qualities, it must be Free, because nothing is so criminal as Justice on sale; Full, because Justice ought not limp; Speedy, because delay is indeed denial; and then its both Justice and Right", 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND 55, was fully accepted in England and in the Colonies and early state governments. Habeas corpus became, by 1679, the principal way of enforcing the right to a speedy trial. By the time of the adoption of the Constitution in this country, habeas corpus had been adopted by a majority of the original colonies either by constitutional provision or by statute.

The requirement of a speedy trial was incorporated in the Bill of Rights without debate as a matter of course. When James Madison proposed a federal bill of rights in the First Congress it included the right to a speedy trial. The only discussion that followed seems to have concerned the question whether an accused (not the prosecutor) might, when necessity required, postpone his trial to the next session of court.

Early state constitutional and statutory guarantees normally included the speedy-trial right, not in general terms,

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*We have developed the historical background of the Sixth Amendment at some length in Appendix A. We briefly summarize that Appendix here.

but specifically, to make certain that each criminal defendant was tried within a short period of his arrest, usually within three to six months. Moreover, the right to speedy trial did not yield to administrative problems or expense but was considered absolute.

As the authority collected in Appendix A demonstrates, criminal cases were regularly dismissed where trial delay was far shorter than that often deemed "normal" today. Despite the fact that delay in the early nineteenth century was caused by administrative problems such as the unavailability of a prosecuting attorney, an insufficient number of judges or jurors, clerical failure or the lapse of time between scheduled terms of court, the right to a speedy trial was repeatedly vindicated. *See, e.g., State* v. *Stalnaker,* 2 Brevard (S. C.) 44 (Const. Ct. 1805); *State* v. *Sims,* 1 Tenn. 253 (Winchester Dist. Ct. 1807); *State* v. *Spergen,* 1 McCord (S. C.) 563 (Const. Ct. 1822); *Commonwealth Cawood,* 2 Va. Cas (4 Va.) 527 (1826). Lord Coke's interpretation of Magna Carta to require trial "speedily without delay" was thus implemented repeatedly in England, in courts in the American colonies and in the early state courts to overbear excuses of what perhaps then were "normal" administrative delays.

B. This Court has made clear that the Sixth Amendment applies to the States and that a State may not deny that right because of expense or inaction.

One of the fundamental cores of the liberties guaranteed by the Bill of Rights and the Fourteenth Amendment is the right to a speedy trial. *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967). As Justice White wrote in *United States* v. *Ewell,* 383 U. S. 116, 120 (1966):

> "This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying

public accusation and to limit the possibilities that long delay and will impair the ability of the accused to defend himself."*

The Court soon after *Ewell* held that the right does not depend on confinement:

> "The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'withersoever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging that oppression, as well as 'the anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States." *Klopfer, supra* at 221-22.

The Supreme Court has required the state to make a diligent, good faith effort to bring a criminal defendant to trial, including every effort to bring him from prison in another jurisdiction. In *Smith* v. *Hooey,* 393 U. S. 374

*That right can also be implemented in a federal court by Fed. R. Crim. P. 48(b) which provides for dismissal in cases of delay. However, the wording of the Rule, that a court "may dismiss", is a statement of power and has led to some unfortunate views that courts have discretion with respect to a defendant's Sixth Amendment right to a speedy trial. The Constitution requires dismissal and therefore grants a right to a defendant. The Rule and the Constitution are not necessarily coterminous: Cohen v. United States, 366 F. 2d 363, 367 (9th Cir. 1966), cert. denied, 385 U. S. 1035 (1967). But where the Constitution is applicable, any part of the Rule which favors the prosecution must give way.

(1969), the Court stated directly that expense is not to be considered a mitigating factor:

> "Finally, the short and perhaps the best answer to any objection based upon expense was given by the Supreme Court of Wisconsin in a case much like the present one: 'We will not put a price tag upon constitutional rights.' State ex rel. Fredenberg v. Byrne, 20 Wis. 2d 504, 512, 123 N. W. 2d 305, 310." *Smith* v. *Hooey, supra* at 380 n. 11.

As the Court recently stated in *Dickey* v. *Florida*, 398 U. S. 30, 37:

> "The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed. If the case for the prosecution calls on the accused to meet charges rather than rest on the infirmities of the prosecution's case, as is the defendant's right, the time to meet them is when the case is fresh. Stale claims have never been favored by the law, and far less so in criminal cases. Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial."

Thus, this Court has made clear that the Sixth Amendment means what it plainly says—an accused must be given a speedy trial or released. The Court has not yet had before it a claim that a delayed trial should be excused because of administrative scheduling problems. Since, however, the Court has refused to "put a price tag" upon a defendant's right to a speedy trial and has refused to approve the failure to take affirmative action by the prosecutor, it should follow that congestion—or "normal" court process—would not abrogate the Sixth Amendment.

C. Encumbering the right to a speedy trial with peripheral rules in effect denies the right.

Four factors have sometimes been used to determine whether a trial has been unconstitutionally delayed. Those four factors are: "(1) the length of the delay; (2) the reason for the delay; (3) the prejudice to the defendant; and (4) waiver by the defendant". *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88, 90 (2d Cir.), *cert. denied*, 396 U. S. 936 (1969). *See also Dickey* v. *Florida*, *supra* at 48, n. 12 (Brennan, J. concurring). We consider each of those factors in turn.

1. *Length of the Delay*—There has not been any definitive statement by this Court about how long a delay will be considered unconstitutional. That concern mirrors the views of other federal courts. *Hodges* v. *United States*, 408 F. 2d 543 (8th Cir. 1969) (17 months); *Falgout* v. *Trujillo*, 270 F. Supp. 685 (D. Colo. 1966), *aff'd per curiam*, 380 F. 2d 376 (10th Cir.), *cert. denied*, 389 U. S. 1010 (1967) (8 months). Our view is that each of those periods is too long.

The rules previously referred to adopted by the Second Circuit in connection with *United States ex rel. Frizer v. McMann*, *supra*, provide a maximum period of six months between arrest and trial.

2. *Reason for the Delay*—There are obviously reasons, such as illness or unavailability of the defendant which would justify delay of trial. In the instant cases the reason for delay—the state's desire to avail itself of a friendly witness—seems unacceptable. In many other cases the only reason offered is court congestion—the breakdown of the administrative processes of the criminal courts. Such an excuse would not have been sufficient to justify the delay to the Framers of the Constitution. Court congestion is

avoidable, indeed it may properly be said to be the result of a choice by governmental bodies between alternative priorities.

When court congestion has been urged as an excuse for delay several appellate courts, though tolerating the excuse, have expressed concern with that argument and its consequences. *See King* v. *United States,* 265 F. 2d 567, 569 (D.C. Cir.), *cert. denied,* 359 U. S. 998 (1959) (delay of 140 days); *Falgout* v. *Trujillo,* 270 F. Supp. 685, 688 (D. Colo. 1966), *aff'd per curiam,* 380 F. 2d 376 (10th Cir.), *cert. denied,* 389 U. S. 1010 (1967) (eight months); *Hodges* v. *United States,* 408 F. 2d 543 (8th Cir. 1969) (delay of 17 months). *See also Dickey* v. *Flordia, supra* at 38 ("Crowded dockets or lack of judges or lawyers, and other factors no doubt make some delays inevitable.") In our judgment, delay excused only by the inability of the process to function in a reasonably efficient manner is not an acceptable answer to the constitutional mandate that a trial be speedy.

3. *Prejudice to the Defendant*—In the present case below and in others such as *United States* v. *Lustman,* 258 F. 2d 475 (2d Cir.), *cert. denied,* 358 U. S. 880 (1958), it was held that in order to take advantage of Sixth Amendment rights a criminal defendant must show prejudice at the time of trial because of the delay. That rule, we believe, has no constitutional justification and no utility except to help excuse unjustifiable delay. As with other rights, prejudice should adequately be found from the fact of violation of the right.* Hence a tainted confession is inadmissible whether true or false and the conviction will

*No other specific procedural safeguard in the Bill of Rights which involves the reliability of the guilt determining process requires a demonstration of prejudice. See Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 493-94 (1968).

be reversed even if other evidence amply supports the verdict. *Jackson* v. *Denno,* 378 U. S. 368 (1964). Failure to admit the public to a trial is error regardless of prejudice. *United States* v. *Kobli,* 172 F. 2d 919, 922-23 (3d Cir. 1949); *Tanksley* v. *United States,* 145 F. 2d 58, 59 (9th Cir. 1944). Whether a defendant was in fact prejudiced by an insufficiently specific indictment is irrelevant although that right exists so that he will not be prejudiced by failing to be informed of the charge. *United States* v. *Seeger,* 303 F. 2d 478 (2d Cir. 1962). As Justice Brennan pointed out in his concurring opinion in *Dickey* v. *Florida, supra* at 41-43, 54-55, prejudice is inherent in substantial delay between arrest and trial both for the individual involved and for society generally. Justice Brennan suggested that once a prescribed period has elapsed, the government would have to sustain a showing of harmless error to avoid dismissal. Although that is a reasonable approach, it seems anomalous to require any showing of prejudice to be entitled to assert this particular constitutional right. Further it is likely to inject an issue capable of arbitrary interpretation into an otherwise stringent and understandable prophylactic rule Thus, the requirement that a defendant show prejudice should be overruled.

4. *Waiver by the defendant*—Of course, a defendant may waive his right to a speedy trial as he may waive any other constitutional right. But he must do so affirmatively, knowingly and with the effective advice of counsel. "Acquiescence in the loss of fundamental rights may not be presumed". *Johnson* v. *Zerbst,* 304 U. S. 458, 464 (1938). As then Judge Blackmun has written: "The right to 'a speedy trial' is constitutionally guaranteed and, as usual, is not to be honored only for the vigilant and the knowledgeable." *Hodges* v. *United States, supra* at 551. Again,

Justice Brennan points out in *Dickey, supra* at 49, that the accused ought not lose his right to speedy trial simply because of silence or inaction on his part. Such a rule misconceives the effect of delay and it misallocates the burden of providing speedy justice. Here it was in the interest of society to see that the petitioner was tried speedily, and it would be unwarranted to expect a defendant facing the possibility of a death sentence to demand trial. As Justice Brennan stated:

> ". . . It [the Sixth Amendment right to a speedy trial] is a safeguard of the interests of both the accused and the community as a whole. Thus, can it be that affirmative action by an accused is required to *preserve*—rather than to *waive*—the right?
>
> ". . . The accused has no duty to bring on his trial. He is presumed innocent until proved guilty; arguably, he should be presumed to wish to exercise his right to be tried quickly, unless he affirmatively accepts delay. The government, on the other hand, would seem to have a responsibility to get on with the prosecution, both out of fairness to the accused and to protect the community interests in a speedy trial." 398 U. S. at 50.

The requirement that a defendant whose trial has been delayed demonstrate prejudice or indicate that he has made the appropriate demand continues to be a substantial impediment to the exercise of the right to a speedy trial despite the statements by Justice Brennan in his concurring opinion in *Dickey* and despite the impending applicability of the speedy trial rules in the Second Circuit. *United States* v. *Quinn,* 445 F. 2d 940 (2d Cir. 1971) (failure to show demand or prejudice justified a two-year pre-indictment delay); *Short* v. *Cardwell,* 444 F. 2d 1368 (6th

Cir. 1971) (failure to demand a trial justified four-year delay); *Brady* v. *Superintendent, Anne Arundel County Detention Center,* 443 F. 2d 1307 (4th Cir. 1971) (failure to show prejudice justified eight-year delay between conviction and trial directed to punishment); *United States* v. *Rosson,* 441 F. 2d 242 (5th Cir. 1971) (lack of prejudice justified 11-month delay between arrest and trial); *Hoskins* v. *Wainwright,* 440 F. 2d 69 (5th Cir. 1971) (defendant must show prejudice from an 8½-year delay between indictment and trial); *United States* v. *Alo,* 439 F. 2d 751 (2d Cir. 1971) (no showing of prejudice justified three-year delay between secret indictment and reindictment and trial); *Maxwell* v. *United States,* 439 F. 2d 135 (2d Cir.), *cert. denied,* 402 U. S. 1010 (1971) (delay of five years justified because no demand made); *United States* v. *Smalls,* 438 F. 2d 711 (2d Cir.), *cert. denied,* 403 U. S. 933 (1971) (delay of two and a half years justified because no showing of prejudice and no demand).

The right to a speedy trial secured by the Sixth Amendment may not, we submit, be yielded to administrative delay, congestion or a series of exceptions which emasculate that right. The magnitude of delay already existing is such that if the right is overborne on those grounds, it will soon be eliminated entirely.

IV

THIS COURT SHOULD DECLARE THE MEANING OF THE CONSTITUTION'S REQUIREMENT THAT A CRIMINAL DEFENDANT BE GRANTED A SPEEDY TRIAL. A DECLARATION OF THAT MEANING SHOULD STIMULATE LEGISLATIVE ADOPTION OF AN APPROPRIATE SOLUTION TO THE PROBLEM OF DELAY.

Of course, this Court's responsibility is to declare the meaning of the Constitution of the United States. It has neither the power nor the resources to force the adoption

of a specific solution to the problem of delay. Nonetheless by declaring that the Constitution requires trial within a certain specified period, the legislature should perceive the necessity to make appropriate expenditures of time and money to seek and implement an appropriate solution to the problem. As the Court recognized in *Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954), despite the fact that a court may not have the tools to prescribe the precise means of reforming the system to meet the requirements of the Constitution, it can and indeed must declare what those requirements are and that those requirements shall be met. Unless this Court declares that the Constitution requires the state to offer a trial to a defendant within a period specified in days or months, the system itself will not respond. Studies will continue to proliferate, committees will beget more committees, and the great stagnant morass of untried criminal cases will spread its pollution through our entire judicial system tainting all we do with the stench of justice delayed and denied.

Nor, as has already been indicated, should this Court allow the use of the restrictive doctrines which excuse delay or look to an absence of prejudice or equate inaction with waiver to continue. The reason for delay is irrelevant to the requirement that trial be offered within a fixed period. Certainly exceptional delays resulting from defendant-initiated procedures can be excluded from the calculation of the period, but this should not affect the essential concept of a fixed period within which trial must be offered. Prejudice too is irrelevant. Furthermore, as has been indicated, regardless of any harm to the defendant, delay is prejudicial to the interests of the criminal justice system itself and society in general. Finally, waiver can continue to be an appropriate limiting doctrine only in so far as it is express and intelligently informed. This is consistent with the present thrust of criminal procedural law.

Realistically, some provision for a transitional period may be necessary. As has been demonstrated, the problem of backlog and delay is one which has been developing for some time. Its dimensions are now quite large, particularly in certain urban locations. An immediately effective, retroactively applicable declaration that all defendants must be offered trial within a sufficiently short period after arrest could result in a general jail delivery and an unbearable burden on the state's fiscal resources. Provision can be made for those practical problems however, and the necessity to provide such should not deter this Court from declaring the meaning of the Constitution. In the past declarations of constitutional principles which would have far reaching effect have led the court to apply them prospectively even though the defendant in question is permitted to benefit from their application. *Johnson* v. *New Jersey*, 384 U. S. 719, 726-35 (1966). Further, the legislature may be given a period of time before the absolute time limit is made fully applicable. *Brown* v. *Board of Education*, 349 U. S. 294, 300 (1955).

CONCLUSION

For all of the foregoing reasons, this Court should:

(1) declare that the Constitution requires that a criminal defendant be offered a trial within a specified period;

(2) discharge petitioner Barker because the system denied him that right; and

(3) affirm that, once a transitional period is past, any defendant who is not offered a trial within the specified period shall be discharged and the case against him dismissed with prejudice.

Anything more may be beyond the power of this Court. Anything less will authorize the continued, systematic violation of a fundamental constitutional right.

March 2, 1972.

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APPENDIX A

THE HISTORIC BACKGROUND AND CONTEMPORARY UNDERSTANDING OF THE CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL

1. The Medieval Foundation

The recognition that justice delayed is justice denied is deeply rooted in Anglo-American legal history. Its place seems first to have achieved official acknowledgment from the crown only a century after the Norman Conquest, the period when the royal government first began asserting control over public order. In 1166, Henry II prescribed in Section Four of the Assize of Clarendon that

> ". . . if the justices are not about to come speedily enough into the county where [a robber or murderer, etc.] have been taken, let the sheriffs send word to the nearest justice . . . and let the sheriffs bring them before the justices. And . . . there before the justices let them stand trial." 2 ENGLISH HISTORICAL DOCUMENTS 407, 408 (D. Douglas and G. Greenway eds. 1953)."*

The terms of the Assize take on particular importance in the present context because of their explicit recognition that delay between apprehension and trial cannot be justified even when caused by the fortuity of administrative arrangements, rather than by the state's purposeful or negligent failure to proceed.

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*There is some dispute as to whether the document in which this provision appears is the Assize of Clarendon or an apocryphal composition of the same century. See H. Richardson and G. Sayles, The Governance of Medieval England 438-44 (1963). Even those who question the document's authenticity, however, concede that, "with some reserves [sic] . . ., the compilation may be accepted as a statement of the procedure in the latter part of Henry II's reign". *Id.* at 443.

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Henry II also systematized the practice of sending justices on frequent itineraries of "eyres" throughout the realm, in order to provide speedy justice at the local level. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 103 (5th ed. 1956). When this procedure was found to be too ponderous, it evolved into that of issuing commissions of gaol delivery and oyer and terminer as a means of dispensing local criminal justice at frequent intervals. *Id.* at 104; *see also* 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 105-11 (1883).

By the Statute of Westminster II, 13 Edw. I, stat. 1, ch. 30 (1285) in 1 PICKERING, STATUTES 203 (1762), it was provided that justices of assize, who customarily carried commmissions of gaol delivery, J. GOEBEL, CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS 54 (7th ed. 1946), should go into every shire "thrice in the Year at the most". 13 Edw. I, stat. 1, ch. 30 (1285). The custom of assigning commissions of gaol delivery to justices of assize was formalized in 1299, when it was enacted that such justices "shall deliver the Gaols of the Shires". 27 Edw. I, stat. 1, ch. III (1299), in 1 PICKERING, STATUTES 281 (1762). In fact, delivery of the gaols apparently occurred more than three times per year during the 13th century, for Maitland found that "the Cambridge gaol seems to have been delivered about twenty-four times in seven years". 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 200 n. 3 (2d ed. 1959).

According to Sir Edward Coke, "Justices of Assise, Justices of *Oyer* and *Terminer*, and Justices of Gaol delivery came at the least into every county twice every year" by the reign of Edward III (1327-77). 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND *42. Perhaps the decline in the frequency with which the justices were appearing in

the shires prompted the statute, 4 Edw. III, ch. 2 (1330), in 1 PICKERING, STATUTES 430 (1762), which provided that "the . . . justices shall . . . deliver the Gaols; at the least three Times a Year, and more often, if need be". *Id.* In subsequent centuries, the duties of the traveling justices were gradually taken over by the local justices of the peace, who were empowered to hear and determine ("oyer and terminer") capital cases at their quarterly general sessions, as well as to deliver the gaols. PLUCKNETT, *supra* at 168-69, 429.

The creation of such a judicial structure was necessary in order to implement the most significant medieval recognition of the speedy-trial requirement as a fundamental legal precept, Chapter 40 of the Great Charter of 1215, in which King John pledged that "to no one will we deny or delay right or justice". Like Chapter 39, which provided for "lawful judgment of [one's] peers or by the law of the land", Chapter 40 was pregnant with potential growth at the hands of the common lawyers of the seventeenth century. Those two chapters, combined into Chapter 29 of the official reissue of 1225, remain on the English statute books to this day. J. HOLT, MAGNA CARTA 1 and nn. 1, 2 (1965). (The quotations from the Charter are Holt's translations. *Id.* at 327).

2. Lord Coke and the "Myth" of Magna Carta.

It is unnecessary to seek the original meaning of the Great Charter to appraise its impact upon the minds of seventeenth and eighteenth century Englishmen and their American counterparts. By that time, the Charter was shrouded in myth and, as Professor Plucknett observed, "the myth has been much more important than the reality" in Anglo-American constitutional development. PLUCKNETT, *supra* at 25.

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The principal architect of this myth was Sir Edward Coke, whose SECOND INSTITUTE achieved its importance, among the American colonists in particular, primarily because of its commentary upon Magna Carta, and "became the classical statement of constitutional principles in the seventeenth century". PLUCKNETT, *supra* at 25. Our history, as Professor Kurland has pointed out,

> ". . . has made clear that it was not the treaty between John and the barons at Runnymeade that provided 'the first great step on the constitutional road,' but Coke's version thereof, especially when combined with his equally inaccurate but highly palatable conception of the common law." Kurland, *Magna Carta and Constitutionalism in the United States: "The Noble Lie"*, in THE GREAT CHARTER 48, 51 (1965).

Thus, it is not surprising that in 1648, when the elders of the colony of Massachusetts considered revising their *Body of Liberties* of 1641, which had preceded by a year the publication of the SECOND INSTITUTE, they sent to England for a copy of the latter. 1 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 457 (1934).

The Great Charter as interpreted by Coke directly influenced the colonial charters, such as the Charter of Fundamental Law of West New Jersey of 1677, the New York Charter of Liberties and Privileges of 1683 and Pennsylvania's Charter of Liberties of 1682. William Penn, who drafted the Pennsylvania Charter, had demonstrated his familiarity with Coke and Magna Carta at his trial in 1670. KURLAND, *supra* at 52-53. Coke and Magna Carta were relied upon by Andrew Hamilton in his defense of Zenger, Kurland, *supra* at 54, and by James Otis, Thomas Hutchinson and other colonial pamphleteers. *E.g.*, Otis,

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The Rights of the British Colonies Asserted and Proved, in 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 408, 462 (B. Bailyn ed. 1965); *see also id.* at 26.

Coke's interpretation of Chapter 40 (Chapter 29 of the 1225 reissue)* thus provides a key to our understanding of the importance of the right to a speedy trial in the eyes of the colonists. In his exposition of King John's commitment neither to sell, deny nor delay justice, Coke wrote:

> "This is spoken in the person of the King who in judgment of law, in all his Courts of Justice is present. . . .
>
> "And therefore, every Subject of this Realm, for injury done to him *in bonis, terris, vel persona* [in goods, lands or person], by any other Subject, be he Ecclesiastical, or Temporal, Free or Bond, Man or Woman, Old or Young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." 2 COKE, INSTITUTES OF THE LAWS OF ENGLAND *55-*56.

"Hereby it appeareth," concluded Coke,

> "that Justice must have three qualities, it must be *Libera, quia nihil iniquius venali Justicia; Plena, quia Justitia non debet claudicare; & Celeris, quia dilatio est quaedam negatio* [Free, because nothing is so criminal as Justice on sale; Full, because Justice ought not limp; Speedy, because delay is indeed

*Coke's commentary follows the 1225 chapter numbering.

denial]; and then its both Justice and Right." *Id.* at *55.

Earlier, in his discussion of Chapter 36 (Chapter 26 of the 1225 reissue), which provided that the writ of life and limb would be freely given, Coke pointed out with obvious pride that

> ". . . the Justices of Assise, Justices of *Oyer* & *Terminer* and of Gaol delivery have not suffered the Prisoner to be long detained, but at their next coming have given the Prisoner full and speedy Justice, by due trial, without detaining him long in Prison." *Id.* at *43.

Indeed, the Justices had been "so far from allowing of his [the prisoner's] detaining in Prison without due trial," stated Coke, that the Abbott of St. Alban's had lost his franchise to operate a jail for refusing to deliver his prisoners to the justices because of the expense involved. *Id.* Thus, an early attempt to use expense as the excuse for delay was effectively quashed.

When we turn to the American colonies, we find that even before Coke's SECOND INSTITUTE had found its way into print, Magna Carta in its seventeenth century dress was having an impact upon the colonists' conception of fundamental law. The first two sections of the Massachusetts *Body of Liberties* of 1641 were modeled directly upon Chapters 39 and 40. THE COLONIAL LAWS OF MASSACHUSETTS 33 (W. Whitmore ed. 1889). But the Massachusetts colonists were unwilling to rely upon a general statement of the right to a speedy trial. Section 41 of the *Body of Liberties* gave force and direction to the general concept:

> "Everie man that is to Answere for any Criminal cause, whether he be in prison or under bayle, his

> cause shall be heard and determined at the next Court that hath proper Cognizance thereof, And may be done without prejudice of Justice." *Id.* at 43.

Apparently even this provision did not sufficiently guarantee the right to a speedy trial in the eyes of the Massachusetts colonists. In their *Laws and Liberties* of 1660, after providing that the Court of Assistants, which had jurisdiction over serious crimes, should sit twice a year at Boston, they stated,

> "And that justice be not deferred nor the Country needlessly charged, It shall be Lawfull for the Governor, or in his absence the Deputie Governour (as they shall judge necessary) to call a Court of Assistants for the tryal of any Melefactor in Capital Causes." *Id.* at 148.

Although it does not directly reflect the influence of the Charter, the *Duke of York's Laws,* compiled from statutes used in other colonies by Richard Nicholls, the first English governor of the colony, and issued at Hempstead, Long Island in 1665, 1 COLONIAL LAWS OF NEW YORK 6 (1896), accepted the validity of the speedy trial concept and recognized that delay because of administrative difficulties is as harmful in result as purposeful or malicious delay. After providing for the Court of Assizes to be held once a year at New York City, the laws mandated that when,

> "Upon information from any Court of Sessions to the Governour and Counsell of any Capitall Offender, unless the Court of Assizes shall happen to be within two Months time after such information; The Governour and Counsell shall Issue forth a

> Commission of Oyer and Terminer for the more Speedy Trial of such Offender." *Id.* at 16-17.

The theoretical underpinnings of this provision was provided seven years later when the colony of New York adopted its own *Charter of Liberties and Privileges,* in which it set forth the protections found in Chapter 29 of the 1225 reissue of the Charter, including the right to speedy trial, in words which are virtually those of the Great Charter itself:

> "That no free man shall be taken and imprisoned or be desseized of his freehold or liberty or free customs, or be outlawed or exiled, or any other ways destroyed, nor shall be passed upon, adjudged, or condemned but by lawful judgment of his peers and by the law of his province. Justice nor right shall be neither sold, denied, or deferred to any man within this province." 9 ENGLISH HISTORICAL DOCUMENTS 228-29 (M. Jensen ed. 1955).

The influence of Magna Carta's proscription of judicial delay is found in other colonial charters, such as article 19 of the Fundamental Constitutions for the Province of East New Jersey art. 19 (1683) in 4 THORPE, FEDERAL AND STATE CONSTITUTIONS 2574, 2580 (1909); the "Laws Agreed Upon in England" (between William Penn and the leaders of Pennsylvania) art. V (1682), in 6 *id.* at 3059, 60, and in a number of the state constitutions which were written prior to the Federal Constitution of 1787. *See, e.g.,* N. C. DECL. OF RIGHTS art. 13 (1776); DEL. CONST. art. I, § 12 (1777); MASS. CONST. Part I, art. XI (1780); N. H. CONST. Part I, art XIV (1784):

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The Massachusetts Constitution of 1780 guarantees the right in terms reminiscent of Coke's ringing phrases:

> "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." MASS. CONST., Part I, art. XI (1780); *see* MASSACHUSETTS COLONY TO COMMONWEALTH, 129-30 (R. Taylor ed. 1961).

3: The Habeas Corpus Act and Its Influence Upon the Colonies

The right to a speedy trial, as is true of most fundamental rights, is not self-executing. And it was not until after the Restoration of Charles II that an effective means of enforcement against royal evasion was found. The primary purpose of the Habeas Corpus Act of 1679, 31 Car. II, ch. 2, was to close loopholes which had rendered the writ of habeas corpus ineffective in securing its objects. *See, e.g.*, WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 79-85 (1960). One of the effective means of evading the writ's purposes was the simple expedient of delaying the defendant's trial. In Section 6 of the Act, an equally simple method of combatting that tactic was adopted:

> ". . . [I]f any person or persons shall be committed for High Treason or Fellony . . . upon his Prayer or Petition in open Court the first Weeke of the Terme . . . to be brought to his Tryall shall not be indicted

> sometime in the next Terme . . . after such Committment . . . the Judges of the Court of Kings Bench . . . are hereby required upon motion to them made in open Court the last day of the Terme . . . either by the Prisoner or any one in its behalfe to sett at Liberty the Prisoner upon Baile unlesse it appeare to the Judges and Justices upon Oath made that the Witnesses for the King could not be produced the same Terme. . . . And if any person or persons committed as aforesaid upon his Prayer or Petition in open Court the first weeke of the Terme . . . to be brought to his Tryall shall not be indicted and tryed the second Terme . . . after his Committment . . . he shall be discharged from his Imprisonment." 31 Car. II, ch. 2 § 6 (1679), in 1 N. COSTIN & J. WATSON, THE LAW AND WORKING OF THE CONSTITUTION: DOCUMENTS 1660-1914, at 46, 49-50 (2d ed. 1961).*

In requiring that the prisoner be bailed if he were not indicted by the first term after his arrest and that he be discharged if he were not both indicted and convicted within two terms, regardless of the reasons for his arrest, the Act transformed a medieval writ of humble origins into a modern and tangible guarantee of a speedy trial. Administrative delay—the absence of Crown witnesses—was tolerated, but for one term only; after the second term the accused was discharged.

The virtues of the Act were immediately perceived by the colonies prior to 1700, and three of them, Massachusetts, New York and Pennsylvania, sought to adopt it expressly.

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*Section 5 of the Act prohibited the prisoner's being recommitted for the same offense after being discharged upon habeas corpus, *id.* at 49, thereby seemingly giving the discharge res judicata effect.

But the Privy Council took the position that it did not apply to the colonies and annulled the colonial legislation, Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 251 (1965), a policy consistent with James II's attempts to repeal the Act. 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 118 (1927). In the eighteenth century, however, the Crown's policy changed and the Royal Governors of Virginia, North Carolina and South Carolina extended the Act's operation to their colonies by proclamation. Oaks, *supra* at 251. Perhaps out of an excess of caution, South Carolina also adopted it by statute in 1712. 2 S. C. STAT. 399 (Cooper ed. 1837). Examples of the use of habeas corpus have been found in other colonies, *see, e.g.*, J. GOEBEL & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 155 n. 71, (1944), and in some of the colonies courts were authorized by statute to issue writs. *See, e.g.*, Act of 1722, in CHARTER TO WILLIAM PENN AND LAWS OF THE PROVINCE OF PENNSYLVANIA 387, 390 (J. Linn ed. 1879).

South Carolina was the only colony which had a statute patterned directly after the English Act at the time of the Declaration of Independence, a fact which Professor Oaks finds surprising, Oaks, *supra* at 251, but which Professor Chafee explains on the grounds that "it had been so long and solidly established in every colonly that assertion was probably considered unnecessary". Chafee, *The Most Important Human Right in the Constitution*, 32 B. U. L. REV. 143-44 (1952). Professor Chafee's conclusion is supported, as Professor Oaks recognizes,* by the fact that the newly independent Americans thought it unnecessary to secure

*Professor Oaks finds the suspension provision in article I, section 9, clause 2 of the Federal Constitution inconsistent with Professor Chafee's views, however, although his reasons for doing so are unclear. Oaks, *supra* at 248.

explicitly many other fundamental rights in more than half of the early state constitutions. Oaks, *supra* at 248. Professor Chafee's conclusion is further buttressed by the seeming assumption of the draftsmen of the Federal Constitution that it was unnecessary to assert the right explicitly, but only to limit the conditions under which it could be suspended. U. S. CONST. art. I, § 9, cl. 2. Moreover, the absence of explicit adoption of habeas corpus acts by some of the original states may also be explained by the "reception" clauses in many state constitutions and statutes, *e.g.*, N. J. CONST. art. 22 (1776); N. Y. CONST. § 35 (1777); DEL. CONST. art. § 25 (1777), whereby English common and statute law in force in the colony prior to independence remained in force.

In any event, by 1787 habeas corpus had been expressly adopted by a majority of the original colonies, either by a general provision in their constitutions, N. C. CONST. art. XIII (1776); MASS. CONST. ch. 6, art. VII (1780); N. H. CONST. (unnumbered clause) (1784); or by a constitutional or statutory provision modelled after the English Act, GA. CONST. art. LX (1777) (incorporates Habeas Corpus Act of 1679); 1 MASS. GEN. LAWS ch. 71 (1784); Act of Feb. 21, 1787, N. Y. LAWS 1785-88, at 424 (1886); Act of Feb. 18, 1785, PA. GEN. LAWS 142 (Dunlop, 2d ed. 1849); Act of 1784, 11 LAWS OF VA. 408 (Hening ed. 1823). Two more states, Delaware and New Jersey, passed statutes soon after, DEL. LAWS ch. IV (1793); Act of Mar. 11, 1795, N. J. REV. LAWS 193 (1820).

Virtually all the early state habeas corpus legislation closely conforms to the English Act. Oaks, *supra* at 253. Delaware's statute of 1793 is illustrative of the provision securing a speedy trial:

> ". . . [I]f any person shall be committed for treason or felony, and shall not be indicted and tried some

time in the next term, . . . after such commitment, . . . the judges . . . are hereby required, upon the last day of the term . . . , to set at liberty the said prisoner upon bail; unless it shall appear to them upon oath or affirmation, *That the witnesses for the state,* mentioning their names, *could not then be produced;* and if such prisoner shall not be indicted and tried the second term, sessions, or court, after his or her commitment . . . he or she shall be discharged from imprisonment." DEL. LAWS ch. IV, § 3 (1793).

4. The Adoption of the Sixth Amendment

It was against this background that George Mason, Virginia lawyer and constitutional draftsman, penned the Virginia Declaration of Rights. *See Virginia Convention of 1776,* in 6 AMERICAN ARCHIVES, 4th Ser., cols. 1509, 1524-29, 1537-57, 1561 (P. Force ed. 1846). *See also* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 39 (1955). The place in the colonies of the ringing phraseology of Coke's commentary upon Magna Carta and the Habeas Corpus Act of 1679, which Virginia had adopted prior to 1700 (although it was annulled by the Privy Council), made it quite natural that the Declaration of Rights would include the provision that "[I]n all capital or criminal prosecutions, a man hath right . . . to a speedy trial." VA. DECL. OF RIGHTS § 8 (1776).* When the Virginia convention which ratified the Federal Constitution in 1788 proposed that a Bill of Rights be added to that document, the requirement of a speedy trial was included as a matter

*The right to speedy trial was also guaranteed by five other early state constitutions (in addition to Virginia). Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights art. XIX (1776); Pa. Decl. of Rights art. IX (1776); Mass. Const. Part I, art. XI (1780); N. H. Const. Part I, art. XIV (1784).

of course and without debate. 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 657, 658 (1881); *see also* 4 *id.* at 242-43 (amendments proposed by North Carolina).

The importance of the right to a speedy trial was also recognized by the Continental Congress. In 1786 a committee reported to the Congress on "a plan of a temporary government for such districts or new states as shall be laid out by the United States". 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 699 (J. Fitzpatrick ed. 1934). The report, which was passed by Congress, *id.* at 669 n. 1, contained only one provision specifying fundamental rights of the inhabitants of such territories:

> "*Resolved*, that the inhabitants of such districts shall always be entitled to the benefits of the Act of habeas corpus and of the trial by Jury." *Id.* at 670.

It seems highly significant that out of all the fundamental rights claimed by the colonists, the two which Congress expressly extended to the new territories at this time were trial by jury and the "Act of habeas corpus," an act which, *inter alia*, implemented the right to a speedy trial. This provision was modified only slightly when a full bill of rights was included in the Northwest Ordinance of 1787.*

The proposed Federal Bill of Rights, as introduced by James Madison in the first Congress, included the "right to a speedy and public trial". 1 ANNALS OF CONGRESS 1st Cong., 1st sess. col. 435. The proposed amendments were first considered by a select committee, *id.* at cols. 450, 660-

*The 1787 Act provided,

> "The inhabitants of the said territory, shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury . . ." 1 Stat. 51, 52 n. (a).

65, 672, the debates of which are not recorded. They were then discussed in the committee of the whole. *Id.* at cols. 703-61. The discussion on the speedy trial requirement is illuminating:

> "Mr. Burke moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence."
>
> "Mr. Hartley said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.
>
> "Mr. Smith, of South Carolina, thought the regulation would come properly in, as part of the Judicial System.
>
> "The question on Mr. Burke's motion was taken and lost; ayes 9, noes 41." *Id.* at col. 756.

Thus, at least in the mind of Congressman Burke, the speedy trial requirement seemed to require a trial at the first session of the court after charge, and, so far as appears from the records, no one argued the contrary. Furthermore, while Burke and others were concerned about allowing the accused to postpone his trial for one term, either as of right or in the court's discretion, no one suggested that the government should be allowed to do so.

The time period represented by a term or "session" of court was, moreover, clear in the minds of those voting in favor of the speedy trial requirement. The same Congress

which adopted the Sixth Amendment also adopted the Judiciary Act of 1789. 1 Stat. 73. Indeed, debates on that act were taking place at about the same time as discussion of the amendments. *See, e.g.*, 1 ANNALS OF CONGRESS, 1st Cong. 1st sess., cols. 659, 782. Section 4 of the act created circuit courts, 1 Stat. 74, which were given jurisdiction over serious crimes. Judiciary Act of 1789, § 11, 1 Stat. 78. The circuit courts were required to hold sessions in each district every six months, and "shall have power to hold special sessions for the trial of criminal causes at any other time." Judiciary Act of 1789, § 4, 1 Stat. 74, 75.

5. The Contemporary Understanding of the Right to a Speedy Trial

The interpretation of the right to a speedy trial in criminal cases by those who lived at the time the Sixth Amendment was adopted and ratified provides further evidence of its intended scope and content. As Zephaniah Swift, author of one of the first American legal treatises, pointed out, the place accorded to this right in the new nation was yet another indication of the contrasts between democracy and monarchy:

> "... If the offense be not bailable, or the criminal unable to procure bail, be committed to prison, there are courts of law constituted for the trial of all offenses, which sit so frequently, that a person can lie in prison but a short time, before he will have a fair opportunity of manifesting his innocence, or of being proved guilty, and obtaining his enlargement, by suffering the punishment that his crime deserves.
>
> "How different this is from the practice of all despotic governments. There the monarch has power

> to commit a man to prison, upon any pretense whatever, and there detain him so long as he pleases without bringing him to trial; . . ." Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 180 (1795).

As Thomas Jefferson pointed out in his description of the administration of justice in the State of Virginia, the Founding Fathers were concerned that the courts be organized in a manner which would assure every defendant an opportunity to receive the benefits of the right to a speedy trial. In addition to creating county courts which followed the example of the English quarter session, Virginia also provided that the General Court, which had jurisdiction over serious crimes, should sit twice a year "for business civil and criminal, and twice more for criminal only." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 125 (T. Abernethy ed. 1964).

The contemporary understanding of the scope and content of the right to a speedy trial is clearly indicated by a number of state court decisions in the early nineteenth century. *State* v. *Sims,* 1 Tenn. 253 (Winchester Dist. Ct. 1807), provides an excellent illustration of the absolute nature of the right, as well as the fact that administrative delay was no excuse. The court held that

> "The ninth section of the Bill of Rights secures to the citizen a speedy public trial, and to demand the cause of the accusation against him. The State has omitted to provide an attorney-general since the resignation of the former one. Upon this man's demanding the cause of accusation against him, and that he shall have a trial, and there being no reason shown why he should not, he ought to be discharged. The omission of the State to provide a public prose-

> cutor cannot render the provision of the Constitution inefficient; this circumstance of itself furnishes no ground to keep the prisoner six months longer in confinement."

Similar holdings may be found in the reports of other states, usually decided under the Habeas Corpus Acts. *See, e.g., State* v. *Stalnaker,* 2 Brevard (S. C.) 44 (Const. Ct. 1805) (Defendant was indicted twice for counterfeiting; tried, convicted, sentenced to hang on one indictment, and pardoned. Two terms having then passed since the second indictment, he was discharged under Habeas Corpus Act); *State* v. *Spergen,* 1 McCord (S. C.) 563 (Const. Ct. 1822); *Commonwealth* v. *Cawood,* 2 Va. Cas. (4 Va.) 527 (1826) (Clerical failure to record indictment; two terms having passed since his commitment for trial, defendant discharged under Habeas Corpus Act). *But cf. Ex parte Santee,* 2 Va. Cas. (4 Va.) 363 (1823) (term of court means actual sitting of court; where scheduled term of court not held because judge ill, not a "term" within meaning of Habeas Corpus Act); *Commonwealth* v. *Sheriff and Gaoler of Allegheny County,* 16 Serg. & R. (Pa.) 304 (1827) (delay of accessory's trial because of preconviction escape of principal does not entitle accessory to writ of Habeas Corpus where conviction of principal legally indispensible to conviction of accessory).

The dissent in *Santee* by Parker, J., with whom three other justices concurred, is of particular interest here because it indicates the concern manifested by the legislature, as well as by the courts, that defendant not be held awaiting trial because of administrative problems:

> "When the District Court system was adopted, this feature [the speedy trial requirement of the *habeas*

> *corpus* act] in the Criminal Law was carefully preserved with this important addition, that the prisoner could not be tried without his consent, by *one* Judge, and that if two did not attend the first Term, he was entitled to bail if not indicted; at the second Term, to be discharged without bail, and if not tried the third Term in consequence of the *absence of one of the Judges*, to be discharged forever from the crime. Now, here, the non-attendance of a Judge was expressly contemplated and provided for. It was to make no difference in the rights of the accused, althought with his consent he might be tried by one; . . ." 2 Va. Cas. at 369.

Perhaps the most conclusive indication of the fundamental nature of the right to a speedy trial in the minds of Americans in the early nineteenth century is *State* v. *Phil*, 1 Stewart (Ala.) 31 (1827). Defendant Phil was a slave, indicted for attempt to commit rape "on a free white woman". At the first term of court following his indictment, the sheriff was unable to produce sufficient *tales* from which to pick a jury. At the second term, to which the trial had thereupon been adjourned, the presiding judge was informed of illness in his family and adjourned the court prior to defendant's case being called. Defendant's counsel moved for dismissal under the Habeas Corpus Act, LAWS ALA. 662 (1807). The motion was denied and at the third term following his indictment, defendant was convicted and sentenced to death. On appeal following his conviction, the Supreme Court of Alabama reversed the denial of the motion for dismissal and ordered defendant discharged under the Habeas Corpus Act. Thus, in Alabama in 1827, even a slave's right to a speedy trial was considered of such

overbearing importance that his conviction of assault upon a white woman was overturned because of delay in his being brought to trial, delay caused by administrative problems and not by purposeful or negligent acts on the part of the state.

6. Conclusion.

The foregoing investigation of the history and contemporary understanding of the right to a speedy trial strongly confirms, we submit, this Court's holding in *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967) that "it is one of the most basic rights preserved by our Constitution," *id.* at 226, a right, moreover, which does not give way in the face of administrative problems on the part of the state, no matter how severe or unforeseen. Whether the problem is a vacancy in the office of attorney general (*State* v. *Sims, supra*), an inadequate number of judges (*Ex parte Santee,* dissenting opinion, *supra*), or jurors (*State* v. *Phil, supra*), clerical failures (*Commonwealth* v. *Cawood, supra*), or lapse of time between scheduled terms (Assize of Clarendon; *Duke of York's Laws, supra*), administrative difficulties could not outweigh the individual's right to have and the state's duty to provide a speedy trial. Justice "promptly, and without delay," in the words of the Massachusetts Constitution of 1780, echoing Coke, was considered an absolute in the minds of those living in the period when the Sixth Amendment was adopted.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER,
Petitioner,

v.

JOHN W. WINGO, WARDEN,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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Washington, D. C. THIEL PRESS 202 393-0625

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OPINIONS BELOW

The opinion of the District Court for the Western District of Kentucky is unreported and may be found in the Joint Appendix (Page 20). The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 442 F.2d 1141 (6th Cir. 1971).

OPINION BELOW

JURISDICTION

After conviction, Petitioner filed an appeal to the Court of Appeals of Kentucky alleging he was denied his right to a speedy trial; that court affirmed the conviction. Petitioner then filed a writ of Habeas Corpus in the District Court for the Western District of Kentucky alleging that he was denied his right to a speedy trial under the Sixth and Fourteenth Amendments to the United States Constitution. The Petition was denied by the District Court on June 1, 1970. Petitioner appealed the order of the District Court to the United States Court of Appeals for the Sixth Circuit which affirmed the District Court's order on May 20, 1971. The Petition for a Writ of Certiorari and Motion to Proceed in Forma Pauperis were filed August 16, 1971, and granted January 17, 1972. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner is required to make a demand for trial and show he was prejudiced by the delay in order to preserve his right to a speedy trial under the Sixth Amendment.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States of America:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATUTES INVOLVED

Florida Criminal Procedure § 915.01(2):

> When a person has been arrested and released on bond, and thereafter for three successive terms of court, files a written demand for trial (serving a copy on the prosecuting attorney) and he is not brought to trial at or before the third full term after the date he is first committed, he shall be forever discharged from the crime; provided, however, the attendance of the witnesses is not prevented by himself, and he has filed no pleading seeking a continuance.

Kentucky Rules of Criminal Procedure, RCr 9.62:

> Testimony of Accomplice
>
> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows that the offense was committed, and the circumstances thereof. In the absence of corroboration as required by law, the court shall instruct the jury to render a verdict of acquittal.

STATEMENT

Petitioner was indicted on September 15, 1958, for the murder of Orleana Denton (Tr. 2, 3). The Christian Circuit Court appointed counsel for Petitioner on September 17, 1958, and trial was set for October 21, 1958 (Tr. 2). However, the Commonwealth of Kentucky was then granted sixteen continuances before the final trial date of October 9, 1963 (Tr. 2-9 A. 2-12). Meanwhile, Petitioner had been released on $5000.00 bond on June 4, 1959 (Tr. 4, 13). Petitioner made no objection to the continuances until February 12, 1962, when Petitioner filed a Motion to Dismiss which was overruled (Tr. 7 A. 9). On March 19,

1963, Petitioner objected to a continuance obtained by the Commonwealth of Kentucky (Tr. 8 A.11) and objected to a continuance granted to the Commonwealth on June 17, 1963 (Tr. 9 A. 11). Prior to trial on October 9, 1963, Petitioner filed another Motion to Dismiss (Tr. 10 A.13). The response of the Commonwealth to the Motion for Dismissal on October 9, 1963, stated that an alleged accomplice, Silas Manning, was a material and indispensible witness against Petitioner (Tr. 12 A.14) It was shown by Affidavit of Manning's counsel that he was unavailable as a witness until his trials were completed as he would have asserted his privilege against self-incrimination prior to that time.

The Commonwealth of Kentucky claimed that Manning was the only one who, according to his testimony, actually saw petitioner in the commission of the crimes (Tr. 8).

The Commonwealth proceeded to prosecute Silas Manning ahead of Petitioner. The Commonwealth tried Silas Manning a total of six times for the crimes. Manning's first trial on October 23, 1958, resulted in a hung jury. The second trial in which he was convicted of murder was reversed by the Kentucky Court of Appeals because of the admission of evidence procured through an illegal search. *Manning v. Commonwealth*, Ky. 328 S.W.2d 421, (1959). Manning was again convicted at his third trial, but this trial was again reversed by the Kentucky Court of Appeals because of the refusal by the Court to grant a motion for a change of venue. *Manning v. Commonwealth*, Ky. 346 S.W.2d 759, (1961). Manning's fourth trial again resulted in a hung jury. Finally in March, 1962, Manning was found guilty of the murder of Pat Denton and in December of 1962, he was found guilty of the murder of Orleana Denton (Tr. 11-13).

At no time during this five-year delay did Petitioner in any way contribute to or cause the delay by filing motions for continuances or otherwise. After the convictions of

Silas Manning were final, a further continuance was granted because of the illness of Sheriff Harold McKinney who was a material witness (Tr. 12-15). Barker was then brought to trial on October 9, 1963. The jury returned a verdict of guilty and fixed his punishment at life imprisonment in the state penitentiary (Tr. 3, 27).

Petitioner then appealed to the Kentucky Court of Appeals contending that he was deprived of his constitutional right to a speedy trial and that the testimony of his alleged accomplice was not sufficiently corroborated under Kentucky law. The Kentucky Court of Appeals affirmed the conviction. *Barker v. Commonwealth*, Ky. 385 S.W.2d 671 (1965). On February 25, 1970, Petitioner filed leave to proceed in forma pauperis in the United States District Court for the Western District of Kentucky, and on March 3, 1970, Petitioner filed Habeas Corpus proceedings in that Court contending that he was denied his right to a speedy trial and that the testimony of his accomplice was insufficiently corroborated under Kentucky law. The District Court rejected the Petitioner's contentions. *Barker v. Commonwealth*, Civil Action No. 2046, Western District of Kentucky, 1970, (Tr. 11). Petitioner then filed Motion for leave to Proceed in Forma Pauperis, in the United States Court of Appeals for the Sixth Circuit, the issuance of a certificate of probable cause and Notice of Appeal on June 11, 1970, which motion was granted by the District Court on June 23, 1970. The United States Court of Appeals for the Sixth Circuit affirmed the Judgment of the District Court, a written opinion which is reported in *Barker v. Wingo*, 442 F.2d 1141 (1971). Petitioner then filed this Petition for Certiorari in the Supreme Court of the United States which Petition was granted on January 17, 1972. Petitioner was paroled in August, 1971.

SUMMARY OF ARGUMENT

Although the right to a speedy trial has been held to be as "fundamental as any of the rights secured by the Sixth Amendment," *Klopfer v. North Carolina*, 386 U.S. 213, 223, Petitioner has not received the benefit of the constitutional safeguards which protect the other Sixth Amendment rights.

Petitioner should not have been required to demand trial in order to protect his right to a speedy trial upon penalty of waiver for failure to do so. A waiver of a constitutional right must be the "intentional relinquishment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464. The notion that Petitioner waived his constitutional right by failing to demand trial is contrary to the requirement of an intentional waiver.

Placing the burden of demanding trial upon Petitioner in light of a potential death sentence is wholly unreasonable. If Petitioner demands trial the result could well be death, but if he hesitates and does nothing he is deemed to have waived his right. The demand rule also distorts the proper application of the guilt determination process by shifting the burden of prosecution from the Commonwealth to Petitioner.

An intelligent, voluntary waiver by Petitioner of his right to a speedy trial was impossible in the absence of procedural standards to inform Petitioner when a demand must be made.

Prejudice should be presumed from a delay of five years between indictment and trial. It is now impossible to show actual prejudice from the record, and unless prejudice is presumed, Petitioner's right to a speedy trial will be worthless. The delay of five years resulted in substantial potential prejudice. It is impossible to know the effect of the delay in terms of distorted facts and testimony, forgotten facts, loss of preception of facts. While the delay may not have resulted in actual prejudice visible

from the record, it gave rise to potential substantial prejudice. *United States v. Wade*, 388 U.S. 218, 236.

ARGUMENT

I.

PETITIONER SHOULD NOT BE REQUIRED TO DEMAND TRIAL OR SHOW PREJUDICE TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL

Although the right to a speedy trial is guaranteed by the Sixth Amendment of the United States Constitution, both federal and state courts have engaged in extensive sophistry in determining whether this right has been violated.

This Court has held that the right to a speedy trial is necessarily relative and depends upon the circumstances of the case. *Pollard v. United States*, 352 U.S. 354. Courts have traditionally cited four factors in determining whether the right to a speedy trial has been denied: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver by defendant. *Solomon v. Mancusi*, 412 F.2d 88 (2d Cir. 1969); *cert. den.* 396 U.S. 936.

The Sixth Circuit relied on prejudice and waiver in affirming the order of the District Court denying Petitioner relief. The Sixth Circuit held that Petitioner had not objected to the delay until his Motion to Dismiss was filed on February 12, 1963,[1] ignoring the time before the motion in computing the delay (442 F.2d at 1142), and further held that Petitioner failed to show he was prejudiced by the delay (442 F.2d at 1143).

Although the Sixth Circuit followed the great weight of authority in denying Petitioner relief, the decision denied Petitioner the constitutional safeguards necessary to preserve his right.

[1] Although the record shows the motion was filed on February 12, 1962, (Tr. 7) with a resulting delay of 18 months rather than seven months, a petition for rehearing was not filed because the Court decided the case on alternate grounds.

The application of the demand rule and the required showing of prejudice violates safeguards established for the protection of other Sixth Amendment rights. These safeguards should apply with full force to the right to a speedy trial.

This Court elevated the right to speedy trial to the constitutional status and importance of other Sixth Amendment rights in *Klopfer v. North Carolina*, 386 U.S. 213, where it applied the right to speedy trial to the states through the Fourteenth Amendment. The Court in *Klopfer* stated that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" 386 U.S. 223) and "that it is one of the most basic rights preserved by our constitution." (386 U.S. 226). The Court (at 386 U.S. 222) also reiterated its holding in *Pointer v. Texas*, 380 U.S. 400.

> We hold that Petitioner is entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment and that guarantee, like the right against compelled self incrimination, is "to be enforced against the states under the Fourteenth Amendment according to the same standards that protect those personal rights against encroachment." *Malloy v. Hogan*, 378 U.S. 1, 10.

Explicit in the application of the Bill of Rights to the states through the Due Process Clause of the Fourteenth Amendment has been the recognition that the protection of a fundamental right is essential to a fair trial. *Gideon v. Wainright*, 372 U.S. 335, 340, *Washington v. Texas*, 388 U.S. 14; *Pointer v. Texas*, 380 U.S. 400; *Parker v. Gladden*, 385 U.S. 363.

The paramount importance of the personal rights secured by the right to a speedy trial was emphasized in *Klopfer* (386 U.S. 221).

> "The Petitioner is not relieved by the limitations placed upon his liberty by the prosecution merely because its suspension permits him to go 'wither-

> soever he will.' The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes."

In the present case, Petitioner has been denied the constitutional safeguards established by this Court to protect other Sixth Amendment rights.

A. The Demand Rule Precludes a Valid Waiver

The Sixth Circuit held that Petitioner waived his right to a speedy trial by his failure to demand trial. The demand rule provides that unless a defendant makes some attempt to resist postponement by the prosecution he waives his right to a speedy trial. *Barker v. Wingo*, 442 F.2d 1141, 1142 (6th Cir., 1971). According to the application of this rule, Petitioner by remaining silent during the delay waived his right to a speedy trial. This reasoning necessarily sanctions the passive waiver of a fundamental right.

The sanction of a passive waiver of a constitutional right violates the very essence of constitutional safeguards designed to safeguard the protection of fundamental rights. In light of the Court's pronouncements it is no defense to say a fundamental right may be passively waived. If the right to a speedy trial is as basic and fundamental as other Sixth Amendment rights, the demand rule can no longer be sanctioned.

This Court has consistently rejected passive waiver of fundamental rights. In *Johnson v. Zerbst*, 304 U.S. 458, 464, waiver was defined as "an intentional relinquishment of a known right or privilege." This Court has further stated that Courts should "indulge every reasonable presumption against waiver," *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, and that Courts should "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 307, (see *Dickey v. Florida*, 398 U.S. 30, 49), (Concurring Opinion of Justice Brennan).

301 U.S. 292, 307, (see *Dickey v. Florida*, 398 U.S. 30, 49), (Concurring Opinion of Justice Brennan).

With respect to the Sixth Amendment right to counsel, the notion of passive waiver has been expressly rejected in *Rice v. Olsen*, 324 U.S. 786, where the Court stated (at p. 788) that a "defendant who pleads guilty is entitled to the benefit of counsel and a request for counsel is not necessary." Again in *Carnley v. Cochran*, 369 U.S. 506, the Court emphasized (at p. 512) that waiver of right to counsel cannot be presumed unless the accused intelligently and understandably waives this right, and (at p. 516) "[T]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver." The inherent injustice promoted by the demand rule with its resulting "passive waiver" is the chilling effect the demand rule places upon the right to a speedy trial.

Petitioner was faced with the possibility of a death sentence if convicted. Placing the burden of demanding trial on Petitioner is wholly unreasonable. This extensive burden was emphasized in *United States v. Chase*, 135 F. Supp. 230, 233 (N.D. Ill., 1955), where the Court refused to apply the demand rule:

> The stakes are too high to imply a waiver without some overt act on his part. This is particularly true when the charge is murder; to require a man to beg for trial on such a charge, with its enormous penalty, requires too much of human nature.

The demand rule as applied by the Sixth Circuit placed Petitioner in a perplexing dilemma for, if he demanded trial, the result certainly could have been the death penalty (particularly in light of the two death sentences his alleged accomplice received); yet because he failed to demand trial, the result was a waiver of the right to a speedy trial.

This dilemma is analogous to the situation posed in *United States v. Jackson*, 390 U.S. 570, where the Federal Kidnapping Act, 18 U.S.C. 1201(a) provided that

only the jury could recommend the death penalty. The problem before the Court was:

> "to decide whether the Constitution permits the establishment of such a death penalty, applicable only to these defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional."

Striking down the provision, this Court said (390 U.S. 583).

> "For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right."

Imposing the burden of demanding trial upon Petitioner has the same effect the Kidnapping Act had in *Jackson*. Requiring Petitioner to demand trial to preserve his right to a speedy trial potentially exposed him to the death penalty, (in *Jackson*, the insistance on the right to jury trial exposed a defendant to the death penalty) yet since Petitioner did not demand his right, he is held to have waived it. But the penalty is more severe to Petitioner. Unlike a defendant under the Kidnapping Act, Petitioner could still have received the death penalty.

Thus the demand rule, by requiring a defendant to demand trial with its potential enormous penalty; has a chilling effect upon the right to a speedy trial. The penalty awaiting the defendant will necessarily cause him grave apprehension and hesitation in demanding trial, but on the other hand, if he fails to demand trial, or if he delays

his demand the trial can be postponed indefinitely but without lifting the threat of the penalty from the defendant.

While there may be truth to the assumption of the Sixth Circuit that delay ordinarily favors the defendant (442 F.2d 1143), the application of the demand rule distorts the proper function of the guilt determination process which was noted in *People v. Prosser*, 130 N.E.2d 891, 895 (C.A.N.Y. 1955);

> It is the state which initiates the action and it is the state which must see that the defendant is arraigned. It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial.

Under American jurisprudence, an accused is presumed innocent until proven guilty and the state bears the burden of proving guilt. Application of the demand rule subverts this duty of the state by shifting the burden to the accused to take affirmative steps to bring about trial. In effect the burden is shifted to a defendant to prove his innocence by demanding a speedy trial.

Waiver of a constitutional right or privilege must be made voluntarily, knowingly and intelligently. *Miranda v. Arizona*, 384 U.S. 436, 444; *Carnley v. Cochran*, 369 U.S. 506; *Rice v. Olson*, 324 U.S. 786.

An intelligent, voluntary and knowing waiver of the right to a speedy trial is impossible without procedural safeguards setting forth guidelines for demand. Although Petitioner was represented by counsel, the absence of procedural guidelines for a speedy trial required Petitioner to speculate and guess as to when demand should be made.

The Sixth Circuit held that Petitioner failed to make any demand for trial until his motion to dismiss in February 12, 1963 and that the time before the motion was made should not be counted as part of the period of delay in determining whether the right to a speedy trial was violated. (442

F.2d 1142). If this rule be held valid, the question is raised as to when Petitioner should have been required to assert his demand; after one year, two years, every term of Court, after every motion for continuance by the Commonwealth.

The fallacy of the Sixth Circuit position is evident. Petitioner's motion to dismiss was overruled even though there had been a delay of 3 1/2 years. Nevertheless the Sixth Circuit discounted the period before demand. Had Petitioner filed a demand immediately after indictment, it is doubtful that the Sixth Circuit would have considered the period between the demand after indictment and the demand of February 12, 1963 in computing the period of delay. Or had Petitioner made a demand immediately after indictment but made no further demand, it is doubtful the Sixth Circuit would have counted the subsequent five years in computing the delay. If Petitioner had filed a demand every year after indictment, it is questionable at which point the delay would be computed.

A demand made within a relatively short period of time after indictment (e.g. one year) would have been superfluous as there would have been no undue delay, yet according to the Sixth Circuit's reasoning this period would not be considered. Moreover, the fact Petitioner's motion to dismiss was overruled indicates that any motion made prior to that time would also have been dismissed.

The speculation required of Petitioner should be contrasted with § 915.01(2) of the Florida Criminal Procedure which provides for discharge from the crime after demand for trial after three successive terms of Court. Although, even in Florida, the demand rule per se is open to constitutional attack, nevertheless the statute clearly sets forth the right of an accused and the procedure necessary to preserve and assert that right.

Seemingly then, the only purpose served by the demand rule is not to bring about a speedy trial, but rather to preserve an accused's right to object. The application

of the demand rule treats the right to a speedy trial as little more than a procedural nicety which may be waived by failing to preserve an objection.

However the right is a basic and fundamental constitutional right which requires an intelligent, voluntary and knowing waiver. So long as an accused is required to speculate as to when a demand must be made, and how many demands must be made, it is inconceivable how he could knowingly and intelligently waive his right.

B. Actual Prejudice Should Not Be Required to Be Proven to Assert the Right to a Speedy Trial

The Sixth Circuit held that, aside from waiver, Petitioner failed to show he was prejudiced by the delay. (442 F.2d 1143). Requiring Petitioner to show prejudice to assert his right to speedy trial is contrary to constitutional safeguards established for other Sixth Amendment rights; including the right to counsel, confrontation, public trial, an impartial jury and knowledge of the charge. (See Concurring Opinion of Justice Brennan, *Dickey v. Florida*, 398 U.S. 30, 54). The denial of these rights may or may not result in actual prejudice but this Court has found prejudice was inherent in the denial of a fundamental constitutional right.

This Court has consistently rejected the principle that an accused must show prejudice on the basis that prejudice is difficult if not impossible to prove.

Where a defendant had been denied the right to counsel at arraignment, the Court, in *Hamilton v. Alabama*, 368 U.S. 52, rejected the rationale of the lower Court denying relief that the accused was not disadvantated in any way by the absence of counsel. This Court said (at 368 U.S. 55).

> When one pleads to a capital charge without the benefit of counsel, we do not stop to determine whether prejudice resulted. *Williams v. Kaiser*, 323

> U.S. 471, 475-476; *House v. Mays*, 324 U.S. 42, 45-46, *Uveges v. Pennsylvania*, 335 U.S. 437, 442. In this case, as in those, the degree of prejudice can never be shown.

Use of television cameras in a courtroom was held in *Estes v. Texas*, 381 U.S. 532, to deprive the defendant of his Sixth Amendment right to a public trial even though prejudice could not be shown. In other cases, the Court noted (at 381 U.S. 543) it

> did not stop to consider the actual effect of the practice but struck down the conviction on the basis that prejudice was inherent in it.

The rationale for presuming prejudice occurs because of the great difficulty of proving actual prejudice and is necessary for the protection of constitutional rights.

Justice Brennan stated in *Dickey v. Florida*, 398 U.S. 55 (Concurring Opinion):

> Because concrete evidence that their denial caused the defendant substantial prejudice is often unavailable, prejudice *must* be assumed, or constitutional rights will be denied without remedy.

Constitutional rights are not predicated upon the existence of actual prejudice but upon the existence of potential substantial prejudice which may affect the right to a fair trial. *United States v. Wade*, 388 U.S. 218, 227; *Dickey v. Florida*, 398 U.S. 55 (Concurring Opinion of Justice Brennan).

Potential substantial prejudice is clearly evident in the present case.

The Transcript of Evidence shows that Martha Barber, the sister-in-law of Silas Manning testified that Petitioner was at her house all night long on the night of the murder (Te 111 A. 19). But the record shows that her testimony was affected by a faded memory.

> Q. Did you hear he (Silas Manning) and Barker talking?

A. I think—if I am not mistaken—it has been so long—I just don't know how to think. I think he asked Silas where his car was. (TE 112).

The effect of this testimony is relevant in two respects.

The Commonwealth relied on the location of Petitioner's car to corroborate the testimony of Silas Manning as required by RCr. 9.62 of the Kentucky Rules of Criminal Procedure. Petitioner contended that Silas Manning stole his car. Moreover, the testimony showed that Barker could not have been at the scene of the crime. Recognizing the weight of evidence is for the jury to consider, nevertheless it is unknown what effect this lapse of memory had on the jury. There is at the minimum a reasonable possibility that Petitioner was prejudiced by the lapse of memory of Martha Barber, although actual prejudice cannot be proved.

More significantly, aside from the testimony of Martha Barber, the record shows no specific prejudice to Petitioner in the form of faded memories, lost witnesses or evidence. However, the record is not so important for what it reveals than for what it does *not* reveal.

Apart from the one specific instance of faded memory above Petitioner can show no other specific prejudice from the record. However it is because of this absence of a specific showing of prejudice that prejudice must be assumed to protect the constitutional right of Petitioner. While the record may be black and white, prejudice does not lend itself to such simplistic analysis but covers a wide gray area.

The record does not show nor could it show what the witnesses may have forgotten or what Petitioner may have forgotten over the five year period. The mere failure of a witness to say that he forgot does not mean that he did not forget. The record does not reveal what facts may have become distorted in the minds of witnesses over five years although they might testify with exactitude as

to the distorted facts. Nor can one ascertain whether the perspective of the witnesses has changed over the period of delay.

Assuming from the bare record that Petitioner has not been prejudiced after a five year delay not only ignores realities of human nature but also raises presumptions to the detriment of Petitioner, which presumptions are impossible to overcome. A constitutional right has been denied Petitioner by speculation from a bare record that he has not been prejudiced.

There can be no doubt but that memories fade over a long period of time, *United States v. Mann*, 291 F. Supp. 268, 271 (S.D. N.Y. 1968). Moreover as stated by Justice Brennan in *Dickey v. Florida*, 398 U.S. 30, 53 (Concurring opinion).

> ". . . it borders on the impossible to measure the cost of delay in terms of the dimmed memories of the parties and available witnesses."

In *United States v. Ewell*, 383 U.S. 116, 120, this Court recognized "the possibilities that long delay will impair the ability of the accused to defend himself."

Therefore while Petitioner may not be able to specifically show actual prejudice, there can be no doubt but that the five year delay involved a grave or substantial potential for prejudice. *United States v. Wade*, 388 U.S. 218, 236. This potential alone should be sufficient to protect the fundamental right to a speedy trial.

Moreover it is impossible to measure the effect of the delay in the personal rights of Petitioner, the public scorn, the anxiety the loss of personal freedom which accompany in indictment for murder. *United States v. Ewell*, 383 U.S. 116, 120; *Klopfer v. North Carolina*, 386 U.S. 213, 222.

Petitioner, although he received life imprisonment, was released on parole in August, 1971 after seven years imprisonment. Had Petitioner been brought speedily to trial

it is reasonable to assume he would have been released from prison several years earlier.

The requirement of showing prejudice also necessitates an after-the-fact application. The remedy for a violation of the right is dismissal of the indictment, *Dickey v. Florida*, 398 U.S. 30. Yet application of the prejudice requirement necessitates, not a dismissal of the indictment, but rather than an accused be brought to trial. If a defendant has been prejudiced, then the indictment is dismissed, but if he does not show prejudice then the indictment and conviction stand. However, the right to a speedy trial is denied, if at all, before the trial, and once it is denied, an accused should be entitled to immediate relief. The issue of prejudice should never arise but rather substantial potential prejudice should be presumed. Petitioner's motion to dismiss on February 12, 1962 and October 9, 1963 should have been granted. His right to speedy trial had been denied and he was entitled to a dismissal of the indictment at that time.

Although not specifically raised by the Sixth Circuit and therefore not placed in issue in this petition is the reason for delay. However since the reason for delay has been held relevent in considering the right to a speedy trial, *Solomon v. Mancusi*, 412 F.2d 88 (2d Cir. 1969) brief mention is made of this point. While the Commonwealth contends that the delay was necessary due to the unavailability of the testimony of Silas Manning, this cannot be sufficient reason. Silas Manning was available at all times. Yet the Commonwealth tried Manning a total of six times for the murders. Two trials resulted in hung juries and two convictions were reversed by the Kentucky Court of Appeals because of errors committed by the Commonwealth. Thus the only reason for the delay was not the absence of a material witness but the difficulty of the Commonwealth in attaining and upholding a conviction because of errors committed by it. Certainly this cannot be a valid reason for delay.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below be reversed, that the Court order the conviction of Petitioner be vacated and that the indictment against him be dismissed.

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5255

WILLIE MAE BARKER ..... Petitioner

V.

JOHN W. WINGO, WARDEN ..... Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

May the Commonwealth delay the trial of an individual for a period of time exceeding five years because of the unavailability of witnesses and not violate that individual's right to a speedy trial?

STATEMENT

The facts and proceedings in the case at bar have been accurately stated by Petitioner.

SUMMARY OF ARGUMENT

The delay of five years between the indictment charging Petitioner with wilful murder and the subsequent trial did not violate his constitutional right to a speedy trial.

Whenever a claim of lack of a speedy trial is raised, several criteria must be examined. The length of the delay must be weighed against the reason for the delay and any prejudice suffered by an accused must be considered. In the case at bar, the Commonwealth's legitimate delay was based on the unavailability of two key witnesses. The Commonwealth proceeded with all due diligence and trial was had at the first term of court when both witnesses were available. When this reason for the delay is balanced against the fact that Petitioner did not suffer any prejudice by virtue of the delay, it is apparent that Petitioner's right to a speedy trail was not violated.

ARGUMENT

I.

THE DELAY OF FIVE YEARS BETWEEN INDICTMENT AND TRIAL DUE TO THE UNAVAILABILITY OF WITNESSES IN THE CASE AT BAR DID NOT VIOLATE PETITIONER'S RIGHT TO A SPEEDY TRIAL.

Facing this Court is the decision of whether or not there is any sufficient justification for delaying the trial of an individual for a long period of time. There cannot be a solid, inflexible rule that a person accused of a crime must be tried within a specified length of time. For example, there is authority for the proposition that a person cannot sustain a speedy trial claim where the delay results from his being a fugitive from justice, dilatory pleadings or motions on the accused's behalf, or from a delay caused by his incompetence to stand trial. See e.g. *Dickey v. Florida*, 398 U. S. 30 (Concurring opinion, Justice Brennan); *United States v. Davis*, 365 F.2d 251, 255 (C.A. 6th 1966).

The delay in the case at bar was based solely on the fact that witnesses were unavailable. *Silas Manning*, Petitioner's accomplice, was the main witness for the Commonwealth. Without his testimony, *Barker* would not have been convicted. However,

Manning was not available to testify[1] until after his legal processes were completed. *Manning's* final trial was in December of 1962 and the Commonwealth set trial for the next available term of court. However, when the case was called for trial, Sheriff *Harold McKinney*, the investigating officer, was suffering from a serious illness and he was unavailable for testimony[2]. Therefore, the case was continued until such time as Sheriff *McKinney* recovered and trial was held at the first available term of court after such recovery.

There is authority for the proposition that the unavailability of a witness is sufficient reason to justify delayed prosecution of an accused. *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (C.A.2nd 1963); *Oden v. United States*, 410 F.2d 103 (C.A.5th 1969), cert. denied 396 U. S. 839 and 863. The Commonwealth submits that unavailability of a witness is a justifiable reason for delaying a trial.

The delay and reason for it must be balanced against the resulting prejudice, if any, against the accused. If the delay, even though occasioned by justificatory reasons, results in substantial prejudice to the accused, then the scales have been tipped against the government and absent some extremely important circumstance, the accused should be entitled to a dismissal of the indictment. The important question is what constitutes substantial prejudice? The first and probably foremost example that occurs to the Commonwealth is loss of witnesses. See e.g. *Dickey v. Florida*, 398 U. S. 30. If one loses witnesses upon whom his defense is based, surely he has been substantially prejudiced. In the case at bar, Petitioner lost no witnesses. Next, a delay in trial might result in a mnemonic loss. However, Petitioner's witnesses testified with conviction and without any apparent loss of memory. 442 F.2d 1141, at 1143, 1144. Also if the

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[1] Affidavit of Manning's counsel stating that Manning would invoke self-incrimination privilege, Transcript of Record, pp. 17, 18.

[2] Harold McKinney's affidavit describing his illness is on Transcript of Record, pp. 14, 15.

accused was incarcerated for a long period preceeding his trial, substantial prejudice might result. In the case at bar, Petitioner was incarcerated for eight and one-half months and for the remaining period he was released on bond. There are various other circumstances which very well might result in prejudice to an accused, but in the case at bar, Petitioner suffered no substantial loss or prejudice. Indeed, the only possible prejudice that Petitioner could have sustained was the fact that he was charged with a crime and the community was aware of this. No such allegation is affirmatively pleaded by Petitioner.

There are four factors to be considered in any speedy trial question: (1) length of delay, (2) reason for delay, (3) prejudice to defendant, and (4) waiver, if any. *United States v. Perez*, 398 F.2d 658 (C.A. 7th 1968). All of these factors must be considered and applied to the facts in each individual case. The right to a speedy trial is necessarily relative, and; it is consistent with delays and depends upon circumstances. *United States v. Ewell*, 383 U. S. 116, 120. There have been many cases holding that legitimate delays for lengthy periods of time do not constitute a violation of one's right to a speedy trial. See e.g. *United States v. Ewell*, 383 U. S. 116; *Von Feldt v. United States*, 407 F.2d 95 (C.A. 8th 1969); *Sims v. United States*, 405 F.2d 1381 (D.C.Cir. 1968); *United States v. Capaldo*, 402 F.2d 821 (C.A. 2nd 1968), cert. denied 394 U. S. 989; *United States v. Peacock*, 400 F.2d 992 (C.A. 6th 1968), cert. denied 393 U. S. 1025 and 1040; *United States v. Kaufman*, 393 F.2d 172 (C.A. 7th 1968), cert. denied 393 U. S. 1098; *United States ex rel. Von Cseh v. Fay*, 313 F.2d 620 (C.A. 2nd 1963).

Another important factor to be considered is whether or not the government deliberately delayed the trial either in an attempt to gain an unfair advantage over the defendant or for some other reason. See e.g. *Dickey v. Florida*, 398 U. S. 30 at 43 (Concurring opinion, Justice Brennan). This is obviously not a factor in the case at bar. *Barker* was brought to trial at the first term of court when all witnesses were available. One has but to look at the

Manning trials to realize the diligence with which the Commonwealth pursued this case. Not one term of court passed between *Manning's* indictment and final trial that he did not have a trial or an appeal pending. There was no lack of diligence by the Commonwealth in prosecuting either *Barker* or *Manning*.

Petitioner makes much of the reference in the opinion below to his failure to demand trial during the greater part of the delay and urges that this case is an appropriate occasion for reconsideration of the demand rule. Respondent submits that it presents no such occasion. The entire delay was due to the unavailability of material witnesses and there is no showing of prejudice. Even if petitioner had demanded trial immediately following indictment, the same period of delay and the same reasons for the delay would still be present. Respondent submits that the reason occasioning the delay would have been justifiable no matter when the demand for trial was made.

The public has a right to effective prosecution of criminal cases. *Ponzi v. Fessenden*, 258 U. S. 254, 264 (1922). In this case the interests of society must be weighed against Petitioner's right to a speedy trial, and when this is done in consideration with the fact that the government pursued due diligence, the delay was legitimate and *Barker* suffered no prejudice, it is apparent that justice was had by all.

CONCLUSION

Whereas the Petitioner, *Willie Mae Barber,* has suffered no violation of his constitutional right to a speedy trial, the decision of the lower court was correct and should be affirmed.

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FILE COPY

No. 71-5255

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIE MAE BARKER, PETITIONER

v.

JOHN W. WINGO, WARDEN, KENTUCKY STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The issues raised by petitioner concern the proper interpretation of the Sixth Amendment. Since this Court's decision may thus affect federal as well as state prosecutions, the United States has an interest in this case. Our brief is addressed mainly to questions concerning the effect of a defendant's failure to demand a speedy trial, although the finding of both courts below that the delay had not impaired petitioner's ability to mount a defense may be dispositive

in this case.[1] With respect to claims based on the Sixth Amendment, our position is that where a defendant is represented by counsel during delay, his failure to demand a speedy trial should foreclose him from relying upon such delay in order to show that he has been denied the right to a speedy trial.

STATEMENT

In September 1958, the Commonwealth of Kentucky indicted petitioner for murdering a woman two

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[1] In addition to relying on the "demand rule," the district court held that the five-year delay in this case was justified by the state's need to secure the testimony of vital witnesses, see *United States* v. *Rosson*, 441 F. 2d 242, 245–249 (C.A. 5); *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 624 (C.A. 2), and that, since petitioner had suffered no prejudice, there had been no denial of the right to a speedy trial (App. 23). The court of appeals, although focusing primarily on the period after petitioner filed his motion to dismiss, did find that none of petitioner's witnesses became unavailable during the five-year period before trial and that their testimony had not been adversely affected by this delay (App. 29).

Whether a valid justification for the delay is enough when the defendant suffers prejudice is a question that need not be determined here since petitioner's ability to defend himself had not been diminished.

In our view, there is also no need to reach the issue whether the burden of proving prejudice should shift to the government when there has been a lengthy delay. There is a conflict among the courts of appeals on this question, compare *United States* v. *DeLeo*, 422 F. 2d 487, 494 (C.A. 1), certiorari denied, 397 U.S. 1037; and *United States* v. *Alo*, 439 F. 2d 751, 755–756 (C.A. 2), certiorari denied, 404 U.S. 850, with *Pitts* v. *North Carolina*, 395 F. 2d 182, 184–185 (C.A. 4); and *Smith* v. *United States*, 418 F. 2d 1120, 1122 (C.A.D.C.), certiorari denied, 396 U.S. 936, but in this case it seems apparent that petitioner suffered no prejudice regardless of which party had the burden of proof.

months earlier (App. 4). On the same date, the Commonwealth also indicted Silas Manning, petitioner's alleged accomplice, for that murder and for the murder of the woman's husband (App. 21, 26). Manning was eventually convicted of both crimes in separate trials held in March 1962 and December 1962 (App. 21–22). During the intervening period, Manning had been tried four other times for the same offenses; the Kentucky Court of Appeals had reversed his conviction twice and his two other trials had resulted in hung juries (App. 21–22). Petitioner was not tried until October 9, 1963 (App. 22). He was convicted and sentenced to life imprisonment; the Kentucky Court of Appeals affirmed. *Barker* v. *Commonwealth*, 385 S. W. 2d 671.

From October 1958, the time originally set for petitioner's trial, until Manning's convictions had become final, the Commonwealth obtained numerous continuances on the ground that Manning's testimony was essential to the prosecution but that he was unavailable because he would invoke his privilege against self-incrimination (App. 22). Petitioner, who was represented by counsel during the entire five-year period preceding his trial and had been free on bail from June 1959, did not object to any of these postponements and at no time demanded a prompt trial (App. 25–26, 28). On February 12, 1963, however, petitioner moved for dismissal of his indictment on

the ground that he had been denied a speedy trial.[2]

In this habeas corpus action under 28 U.S.C. 2254, petitioner argues that his conviction should be vacated and his indictment dismissed because the five-year interval between indictment and trial deprived him of his Sixth Amendment right to a speedy trial.[3] The district court held that a defendant's right to a speedy trial could be waived if not asserted and that here petitioner's counsel, as a matter of strategy, did not object to the continuances and did not move for a speedy trial. The court also found that petitioner had not been prejudiced by the five-year delay since all of his witnesses were available at trial and he had not asserted that their ability to recollect had been impaired. (App. 22–23.)

The court of appeals affirmed on the basis that petitioner could not object to the delay prior to Feb-

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[2] Both the district court (App. 20) and the court of appeals (App. 26) stated that petitioner first made such a motion on February 12, 1963; this is also the date given in the opinion of the Kentucky Court of Appeals, 385 S.W. 2d at 674. Petitioner states that he first moved to dismiss for lack of a speedy trial on February 12, 1962 (Pet. Brief, at 3, 18).

[3] Petitioner raised the same issue in the Kentucky Court of Appeals. In 1964 that court held that the speedy trial provision of the Sixth Amendment does not apply to state prosecutions (but see *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967)) and that the delay did not violate petitioner's right to a speedy trial under Section 11 of the Kentucky Constitution because (1) petitioner's failure to demand a speedy trial precluded consideration of the period before February 12, 1963; (2) the Commonwealth was justified in seeking continuances after that date since an important witness was ill; and (3) petitioner had not suffered any prejudice from the delay between February and October 1963, when his trial occurred. 385 S.W. 2d at 674.

ruary 12, 1963, because he had not demanded a speedy trial (App. 27–29) [4] and that (App. 29):

> More significantly, appellant has shown no prejudice resulting from this delay. There is no claim that during this eight-month period (or before) any witnesses became unavailable. Although appellant claims that certain defense witnesses' memories faded over the years, this assertion is not substantiated by the record. Appellant's witnesses testified with conviction and, in comparison with testimony in the earlier Manning trials, without apparent mnemonic loss. Under these circumstances, appellant is not entitled to a discharge from custody. * * *

DISCUSSION

The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *." Under the "demand rule," the accused has the obligation to seek a prompt trial. If he takes no action he cannot rely on the passage of time between charge and trial to show that he had been denied the right to a speedy trial. If he waits and demands a speedy trial after time has already elapsed, the court will consider only the period

[4] The court of appeals treated petitioner's motion for dismissal of the indictment as the equivalent to a demand for a speedy trial (App. 27 n. 1). Other courts have refused to consider such a motion as meeting the demand requirement since the remedy sought is not a trial but dismissal of the charges. See *United States* v. *Maxwell*, 383 F. 2d 437, 441 (C.A. 2), certiorari denied, 389 U.S. 1057; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648.

after his demand in determining his Sixth Amendment claim.[5]

The origins of the "demand rule" are rather obscure. There is an obvious analogy to the English Habeas Corpus Act of 1679, 31 Charles II, c. 2, which provided for "more speedy relief" of prisoners and required that persons jailed for felony or treason be brought to trial *upon their own motion* within two terms of court or be discharged on bail. *Id.*, Section VII. Many of the states that ratified the Bill of Rights adopted the provisions of the English Act or used it as a guide in passing similar legislation. See *United States* v. *Marion*, No. 70–19, decided Dec. 20, 1971, slip op. at p. 7 n. 6; *Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md.), affirmed, 350 U.S. 857; cf. Cooley, *Constitutional Limitations* 312 n. 2 (1868).[6]

However, not all of those state laws or the laws of states later admitted to the Union expressly required affirmative action by the prisoner in order to preserve his right to a speedy trial. See, *e.g.*, *Commonwealth* v. *Sheriff & Gaoler of Allegheny County*, 16 Serg. & R. 304 (Pa. 1827) (prisoner must not assent to delay); *State* v. *Phil*, 1 Stew. 31 (Ala. 1827) (prisoner required only not to agree to postponement); but see,

[5] The "demand rule" is to be distinguished from the doctrine, sometimes invoked to bar speedy trial claims, that claims not raised at trial may not be raised on appeal. See *Peoples* v. *Hocker*, 423 F. 2d 960, 965–966 (C.A. 9); *Benson* v. *United States*, 402 F. 2d 576, 580–581 (C.A. 9); *Chapman* v. *United States*, 376 F. 2d 705 (C.A. 2).

[6] See also the exhaustive note appended to the end of the opinion in *Nixon* v. *State*, 2 Smedes & Marshall 497, 41 Am. Dec. 601, 604–607 (Miss. 1844).

e.g., Commonwealth v. *Phillips,* 16 Mass. 422, 426 (1820). Nevertheless, some state courts, even in the absence of express constitutional or statutory language to that effect, refused to grant relief unless the accused had demanded a prompt trial. See, *e.g., Stewart* v. *State,* 13 Ark. (8 Eng.) 720, 733–734 (1853):

> We cannot shut our eyes to the fact, known to all who are acquainted with the administration of justice, that where the crime is of magnitude, delays diminish the chances of conviction, and with that hope are usually sought or acquiesced in by the accused. And for that reason, we think the spirit of the law is, that for a prisoner to be entitled to his discharge for want of prosecution, he must have placed himself on the record in the attitude of demanding a trial, or at least of resisting postponements.

Over the years the demand rule became firmly established in a majority of the states. As the court, after an extensive discussion of the rule, concluded in *Pines* v. *District Court,* 233 Iowa 1284, 1302, 10 N.W. 2d 574, 583 (1943), although the constitutional or statutory provisions regarding speedy trial contained no "condition that a failure to demand trial will defeat the accused's motion for discharge, yet the courts, with but few exceptions, have construed the provisions as though they contained such a condition."[7]

Early federal court decisions also followed the demand rule in cases involving the Sixth Amendment. See, *e.g., Phillips* v. *United States,* 201 Fed. 259, 262

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[7] Note, *The Lagging Right to a Speedy Trial,* 51 Va. L. Rev. 1587, 1604 n. 87 (1965), reports that eight states have rejected the demand doctrine.

(C.A. 8); *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari denied, 266 U.S. 626; *Daniels* v. *United States*, 17 F. 2d 339 (C.A. 9), certiorari denied, 274 U.S. 744. Today the rule prevails in all the circuits that have considered the issue.[8] See *United States* v. *Butler*, 426 F. 2d 1275, 1278 (C.A. 1); *United States* v. *DeMasi*, 445 F. 2d 251, 255–256 (C.A. 2);[9] *United States* v. *Hill*, 310 F. 2d 601, 603–604 (C.A. 4); *Bruce* v. *United States*, 351 F. 2d 318, 320 (C.A. 5), certiorari denied, 384 U.S. 921; *United States* v. *Perez*, 398 F. 2d 658, 661 (C.A. 7), certiorari denied, 393 U.S. 1080; *Bandy* v. *United States*, 408 F. 2d 518, 522 (C.A. 8); *Moser* v. *United States*, 381 F. 2d 363 (C.A. 9), certiorari denied, 389 U.S. 1054; *Pietch* v. *United States*, 110 F. 2d 817, 819 (C.A. 10), certiorari denied, 310 U.S. 648; *Smith* v. *United States*, 331 F. 2d 784 (C.A. D.C.) (*en banc*).[10]

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[8] We have found no Third Circuit case on point. Cf. *United States* v. *Carosiello*, 439 F. 2d 942, 944 n. 4 (C.A. 3). The decision of the Sixth Circuit in the instant case serves as an example of its adherence to the rule.

[9] But see pp. 12–13 *infra*, with respect to the Second Circuit.

[10] The federal courts, however, have created exceptions to the rule in numerous circumstances:

(a) Accused unaware of pending charges or had no opportunity to make a demand, *Pitts* v. *North Carolina*, 395 F. 2d 182, 187 (C.A. 4); *Taylor* v. *United States*, 238 F. 2d 259, 261 (C.A. D.C.); *Fouts* v. *United States*, 253 F. 2d 215, 218 (C.A. 6);

(b) Accused not represented by counsel during delay, *United States* v. *Butler*, 426 F. 2d 1275, 1278 (C.A. 1), affirmed after remand, 434 F. 2d 243, certiorari denied, 401 U.S. 978; *Coleman* v. *United States*, 442 F. 2d 150, 155–156 (C.A. D.C.);

The courts that adhere to the demand doctrine have not based their rulings on an interpretation of the Sixth Amendment, but instead have generally relied on the theory that the accused's silence or inaction indicates his acquiescence in the delay. That is, by failing to demand a speedy trial or by failing to oppose prosecution motions for continuances, the accused waives his right to rely upon the elapsed time as a basis for having his indictment dismissed for lack of a speedy trial. See *United States* v. *Lustman*, 258 F. 2d 475, 478 (C.A. 2); *Pines* v. *District Court*, *supra*, 233 Iowa 1284, 10 N.W. 2d 574.[11]

The underlying premise of the rule is the "almost universal experience that delay in criminal cases is welcomed by defendants as it usually operates in their favor." *United States ex rel. Von Cseh* v. *Fay*, 313 F. 2d 620, 623 (C.A. 2). See also *Fouts* v. *United States*, 253 F. 2d 215 (C.A. 6), certiorari denied, 358 U.S. 884; *Campodonico* v. *United States*, 222 F. 2d

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United States v. *Richardson*, 291 F. Supp. 441, 446–447 (S.D. N.Y.);

(c) Delay between arrest and indictment should not be considered because it is unreasonable to expect a defendant to demand to be indicted, *United States* v. *Colitto*, 319 F. Supp. 1077, 1082–1083 (E.D. N.Y.);

(d) Demand would not serve the interest of expediting a proper trial, *Petition of Provoo*, *supra* (charges brought in district of doubtful venue).

See generally Note, *The Right to a Speedy Trial*, 20 Stan. L. Rev. 476, 479 n. 27 (1968).

[11] See Note, *The Lagging Right to a Speedy Trial*, 51 Va. L. Rev. 1587, 1601–1610 (1965).

310, 315–316 (C.A. 9); *Stewart* v. *State*, *supra*, 13 Ark. (8 Eng.) at 733–734 (1853) ("delays diminish the chances of conviction, and with that hope are usually sought or acquiesced in by the accused"). In addition, requiring a defendant to make a demand if he wishes prompt adjudication of the charges imposes no substantial burden upon him. See, *e.g.*, *State* v. *McTague*, 173 Minn. 153, 154, 216 N.W. 787, 788. Doubtless another factor that has persuaded courts to require defendants to preserve their rights through some affirmative action is the extreme nature of the remedy for denial of a speedy trial—dismissal of the indictment with prejudice. This is reflected in the oft-quoted statement that "the right to speedy trial is not designed as a sword for the defendant's escape, but rather as a shield for his protection,"[12] which presumably means that if a defendant wishes to benefit from the right to a speedy trial he must seek a prompt trial, not simply dismissal of the indictment after substantial time has passed, particularly since he may in fact have welcomed the delay.

Although the demand rule has been criticized,[13] primarily on the ground that it conflicts with the principle that waiver of constitutional rights can be found only when there is "an intentional relinquishment or abandonment of a known right or privilege,"[14] we

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[12] *United States* v. *Lustman*, *supra*, 258 F. 2d at 478, quoting Note, *The Right to a Speedy Criminal Trial*, 57 Colum. L. Rev. 846, 853 (1957).

[13] See *Dickey* v. *Florida*, 398 U.S. 30, 39, 49–50 (Mr. Justice Brennan, concurring); Note, *The Lagging Right to a Speedy Trial*, 51 Va. L. Rev. 1587, 1601–1605 (1965).

[14] *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

believe that the rule continues to have validity when confined to cases where the defendant was represented by counsel during the delay. See *United States* v. *Butler*, 426 F. 2d 1275 (C.A. 1), affirmed after remand, 434 F. 2d 243, certiorari denied, 401 U.S. 978.[15] Unlike the situation with respect to other constitutional rights, it may not be to the accused's advantage to invoke the right to a speedy trial since delay usually benefits the defense rather than the prosecution.[16] Of course, in some cases the defendant may later believe that the passage of time has worked against him. But the underpinning of the demand

[15] "If a defendant is without counsel it is all too likely that he will not know either that he is entitled to a speedy trial or that the failure to promptly demand the same may have serious adverse consequences. In such a situation, we think it inconsistent with recent trends concerning the waiver of constitutional rights to visit upon an accused the consequences of a late demand sought by the government. * * * Accordingly, only such pre-demand delay as occurred after defendant secured the assistance of counsel will be disregarded unless it appears that the defendant was aware of his rights and the consequences of failing to demand trial." 426 F. 2d at 1278.

[16] We are aware of no empirical studies on point, but the consistent statements of lower courts experienced in these matters attest to the validity of the proposition that defendants usually welcome delay because it operates to their advantage. See also *Dickey* v. *Florida*, 398 U.S. 30, 37–38 ("a great many accused persons seek to put off the confrontation as long as possible"); but see *id.* at 49 (Mr. Justice Brennan, concurring).

In a survey of the criminal justice system, *Newsweek* (March 8, 1971, at p. 29) reported the following statement of a public defender experienced in handling criminal cases:

"The last thing you want to do is rush to trial. You let the case ride. Everybody gets friendly. A case is continued ten or fifteen times, and nobody cares any more. The victims don't care. Everybody just wants to get rid of the case."

rule is that the accused cannot have it both ways: he cannot welcome delay and seek to gain an advantage at trial from it, and then later avoid trial entirely by having the indictment dismissed because of the delay. Instead, he must decide on one course or the other. He must either demand a speedy trial or allow the time to pass without objection.

This is not to say that long delays should be countenanced when the defendant acquiesces. Quite apart from the defense and the prosecution, the public has an interest in prompt disposition of criminal charges since "a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses." [17] From this, however, it scarcely follows that the drastic remedy of dismissing an indictment is the appropriate response to delay when the defendant has neither demanded a speedy trial nor opposed prosecution motions for continuances. In these circumstances, allowing a defendant charged with committing a crime to go free without trial would only compound the injury to the public interest.

The situation is quite different when specific rules are provided, such as those adopted by the Second Circuit, which require the prosecution to be ready for trial within six months of arrest or indictment, which-

[17] ABA, *Standards Relating to Speedy Trial* 10–11 (Approved Draft 1968).

ever is earlier.[18] Then the accused cannot expect to gain an advantage from lengthy delays and the prosecution has been put on notice that it must proceed to trial within a specific time.

But in the absence of such rules, it is proper to require defendants, with the assistance of counsel, to make a choice whether they wish a prompt trial. The objection that a defendant's remaining silent cannot be construed as an intentional relinquishment of his right to a speedy trial has no force when directed at defendants who are represented by an attorney. Defense counsel will surely know that if the defendant takes no affirmative action he cannot later seek dismissal of the charges because of the delay. That counsel's advice on this matter may seem unwise when viewed in retrospect is not a reason for dispensing with the demand requirement. The possibility of such mistakes is a common, and perhaps inevitable, risk in the administration of criminal justice. In this respect, the situation is not unlike that in *McMann* v. *Richardson,* 397 U.S. 759, 769–770, where the Court held that a defendant could not undo his plea of guilty on the ground that it had been induced by the allegedly erroneous advice of his attorney regarding the admissibility of a confession where that advice, even if mistaken in hindsight, was within the range

[18] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (adopted January 5, 1971); see also the proposed amendment to Rule 50(b) of the Federal Rules of Criminal Procedure, submitted by the Judicial Conference of the United States and now pending before this Court.

of competent representation. Like the choice to permit a defendant to testify or to assert a specific defense, the failure to demand a speedy trial may be legitimately regarded as a tactical decision binding upon the defendant that his interests would be better served by not seeking a prompt adjudication of guilt. See *Henry* v. *Mississippi*, 379 U.S. 443, 451–452; *United States ex rel. Green* v. *Rundle*, 452 F. 2d 232 (C.A. 3).

Defense counsel, through interviews with the accused, informal discussion with the prosecutor, and independent investigation, is able to learn enough about the type of proof that will be offered of his client's guilt to decide whether the passage of additional time is likely to improve or injure his client's chances at trial. Often he will have specific knowledge indicating that a particular prospective witness for the government may become unavailable through further delay, as where the witness is old, sick, resides abroad, or may flee to avoid giving testimony. Where the proof apparently will depend on conflicting versions of observed events, defense counsel may conclude that as time passes and memories dim the accused will benefit in view of the government's heavy burden of proof. Similarly, counsel may decide that his client's offense is of such relatively minor importance that the chances of a plea bargain will increase with time

as the prosecutor's office becomes occupied with more pressing business.

In the present case, it must have been evident to petitioner's counsel, if not to petitioner himself, that the Commonwealth would attempt to secure Manning's conviction before trying petitioner so that Manning could not assert the privilege against self-incrimination when called to testify against petitioner. Yet at no time over a period of years did petitioner demand a speedy trial or oppose the Commonwealth's motions for continuances, which would have compelled the prosecutor either to afford a prompt trial without the benefit of Manning's testimony or to justify further postponement against petitioner's objection. Petitioner's decision may have been based on his fear that conviction would nonetheless ensue and that the death penalty would be imposed,[19] or in the hope that the Commonwealth's efforts to obtain Manning's conviction would be unsuccessful, thereby improving petitioner's chances of a plea bargain or of acquittal. In either event, petitioner's decision not to seek a speedy trial indicates that he thought he would benefit from following this course. Such a decision is well within the range of competent counsel and, we submit, precludes petitioner from now relying on this delay as a

[19] Compare *Brady* v. *United States*, 397 U.S. 742.

basis for reversal of his conviction and dismissal of his indictment for lack of a speedy trial.[20] Accordingly, we think the result below was correct.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.

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[20] We add that with respect to any delay properly relied on by a defendant raising a speedy trial claim, we continue to adhere to the view that, in the absence of specific rules such as those adopted by the Second Circuit, the drastic step of dismissing a criminal prosecution can only be justified if the injury to the defendant outweighs the public interest in trying him for the offenses charged. In the absence of a showing of actual harm to the defendant from the delay, the balance is in favor of allowing the prosecution to proceed and of allowing a subsequent conviction to stand. For this reason, the Court has in the past emphasized the absence or presence of prejudice in determining whether the defendant was entitled to relief on his speedy trial claim. *United States* v. *Ewell*, 383 U.S. 116, 120, 122; *Dickey* v. *Florida*, 398 U.S. 30, 36–38; cf. *United States* v. *Marion*, No. 70–19, decided December 20, 1971, slip op. at 18–19. We believe the Court should continue to follow this course.

U.S. GOVERNMENT PRINTING OFFICE: 1972

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BARKER *v.* WINGO, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–5255. Argued April 11, 1972—Decided June 22, 1972

Petitioner was not brought to trial for murder until more than five years after he had been arrested, during which time the prosecution obtained numerous continuances, initially for the purpose of first trying petitioner's alleged accomplice so that his testimony, if conviction resulted, would be available at petitioner's trial. Before the accomplice was finally convicted, he was tried six times. Petitioner made no objection to the continuances until three and one-half years after he was arrested. After the accomplice was finally convicted, petitioner, after further delays because of a key prosecution witness' illness, was tried and convicted. In this habeas corpus proceeding the Court of Appeals, concluding that petitioner had waived his right to a speedy trial for the period prior to his demand for trial, and in any event had not been prejudiced by the delay, affirmed the District Court's judgment against petitioner. *Held:* A defendant's constitutional right to a speedy trial cannot be established by any inflexible rule but can be determined only on an *ad hoc* balancing basis, in which the conduct of the prosecution and the defendant are weighed. The court should assess such factors as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. In this case the lack of any serious prejudice to petitioner and the fact as disclosed by the record, that he did not want a speedy trial outweigh opposing considerations and compel the conclusion that petitioner was not deprived of his due process right to a speedy trial. Pp. 5–21.

442 F. 2d 1141, affirmed.

POWELL, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BRENNAN, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71-5255

Willie Mae Barker, Petitioner, v. John W. Wingo, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 22, 1972]

MR. JUSTICE POWELL delivered the opinion of the Court.

Although a speedy trial is guaranteed the accused by the Sixth Amendment to the Constitution,[1] this Court has dealt with that right on infrequent occasions. See *Beavers* v. *Haubert*, 198 U. S. 77 (1905); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Ewell*, 383 U. S. 116 (1966); *United States* v. *Marion*, 404 U. S. 307 (1971). See also *United States* v. *Provoo*, 17 FRD 183 (D. Md.), aff'd, 350 U. S. 857 (1955). The Court's opinion in *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967), established that the right to speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteen Amendment on the States.[2] See *Smith* v. *Hooey*, 393 U. S. 374 (1969); *Dickey* v. *Florida*,

[1] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

[2] "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." 286 U. S., at 223.

398 U. S. 30 (1970). As MR. JUSTICE BRENNAN pointed out in his concurring opinion in *Dickey*, in none of these cases have we attempted to set out the criteria by which the speedy trial fight is to be judged. 398 U. S., at 40–41. This case compels us to make such an attempt.

I.

On July 20, 1958, in Christian County, Kentucky, an elderly couple was beaten to death by intruders wielding an iron tire tool. Two suspects, Silas Manning and Willie Barker, the petitioner, were arrested shortly thereafter. The grand jury indicted them on September 15. Counsel was appointed on September 17, and Barker's trial was set for October 21. The Commonwealth had a stronger case against Manning, and it believed that Barker could not be convicted unless Manning testified against him. Manning was naturally unwilling to incriminate himself. Accordingly, on October 23, the day Silas Manning was brought to trial, the Commonwealth sought and obtained the first of what was to be a series of 16 continuances of Barker's trial.[3] Barker made no objection. By first convicting Manning, the Commonwealth would remove possible problems of self-incrimination and would be able to assure his testimony against Barker.

The Commonwealth encountered more than a few difficulties in its prosecution of Manning. The first trial ended in a hung jury. A second trial resulted in a conviction, but the Kentucky Court of Appeals reversed because of the admission of evidence obtained by an illegal search. *Manning* v. *Commonwealth*, 328 S. W. 2d 421 (CA Ky, 1959). At his third trial, Manning was again convicted, and the Court of Appeals again reversed

[3] There is no explanation in the record why although Barker's initial trial was set for October 21, no continuance was sought until October 23, two days after the trial should have begun.

because the trial court had not granted a change of venue. *Manning* v. *Commonwealth*, 346 S. W. 2d 755 (CA Ky. 1961). A fourth trial resulted in a hung jury. Finally, after five trials, Manning was convicted, in March 1962, of murdering one victim, and after a sixth trial, in December 1962, he was convicted of murdering the other.[4]

The Christian County Circuit Court holds three terms each year—in February, June, and September. Barker's initial trial was to take place in the September term of 1958. The first continuance postponed it until the February 1959 term. The second continuance was granted for one month only. Every term thereafter for as long as the Manning prosecutions were in process, the Commonwealth routinely moved to continue Barker's case to the next term. When the case was continued from the June 1959 term until the following September, Barker, having spent 10 months in jail, obtained his release by posting a $5,000 bond. He thereafter remained free in the community until his trial. Barker made no objection, through his counsel, to the first 11 continuances.

When on February 12, 1962, the Commonwealth moved for the twelfth time to continue the case until the following term, Barker's counsel filed a motion to dismiss the indictment. The motion to dismiss was denied two weeks later, and the State's motion for a continuance was granted. The State was granted further continuances in June 1962 and September 1962, to which Barker did not object.

In February 1963, the first term of court following Manning's final conviction, the Commonwealth moved to set Barker's trial for March 19. But on the day scheduled for trial, it again moved for a continuance until the June term. It gave as its reason the illness

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[4] Apparently Manning chose not to appeal these final two convictions.

of the ex-sheriff who was the chief investigating officer in the case. To this continuance, Barker objected unsuccessfully.

The witness was still unable to testify in June, and the trial, which had been set for June 19, was continued again until the September term over Barker's objection. This time the court announced that the case would be dismissed for lack of prosecution if it were not tried during the next term. The final trial date was set for October 9, 1963. On that date, Barker again moved to dismiss the indictment, and this time specified that his right to a speedy trial had been violated.[5] The motion was denied; the trial commenced with Manning as the chief prosecution witness; Barker was convicted and given a life sentence.

Barker appealed his conviction to the Kentucky Court of Appeals, relying in part on his speedy trial claim. The court affirmed. *Barker* v. *Commonwealth*, 385 S. W. 2d 671 (CA Ky. 1964). In February 1970 Barker petitioned for habeas corpus in the United States District Court for the Western District of Kentucky. Although the District Court rejected the petition without holding a hearing, the Court granted petitioner leave to appeal *in forma pauperis* and a certificate of probable cause to appeal. On appeal, the Court of Appeals for the Sixth Circuit affirmed the District Court. 442 F. 2d 1141 (CA6 1971). It ruled that Barker had waived his speedy trial claim for the entire period before February 1963, the date on which the court believed he had first objected to the delay by filing a motion to dismiss. In

[5] The written motion Barker filed alleged that he had objected to every continuance since February 1959. The record does not reflect any objections until the motion to dismiss, filed in February 1962, and the objections to the continuances sought by the Commonwealth in March 1963 and June 1963.

this belief the Court was mistaken, for the record reveals that the motion was filed in February 1962. The Commonwealth so conceded at oral argument before this Court.[6] The court held further that the remaining period after the date on which Barker first raised his claim and before his trial—which it thought was only eight months but which was actually 20 months—was not unduly long. In addition, the Court held that Barker had shown no resulting prejudice, and that the illness of the ex-sheriff was a valid justification for the delay. We granted Barker's petition for certiorari. — U. S. — (1972).

II

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused. The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.[7] In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes.[8] It must be of little comfort to the residents of

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[6] Tr. of Oral Arg., at 33.

[7] Report of the President's Commission on Crime in the District of Columbia 256 (1966).

[8] In Washington, D. C., in 1968, 70.1% of the persons arrested for robbery and released prior to trial were re-arrested while on bail. Mitchell, Bail Reform and the Constitutionality of Pretrial Deten-

Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape.[9] Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation.[10]

If an accused cannot make bail, he is generally confined, as was Barker for 10 months, in a local jail. This contributes to the overcrowding and generally deplorable state of those institutions.[11] Lengthy exposure to these conditions "has a destructive effect on human character and makes the rehabilitation of the individual offender much more difficult."[12] At times the result may even be violent rioting.[13] Finally, lengthy pretrial detention is costly. The cost of maintaining a prisoner in jail varies from $3 to $9 per day, and this amounts to millions across

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tion, 55 Va. L. Rev. 1223, 1236 (1969), citing Report of the Judicial Council Committee to Study the Operation of the Bail Reform Act in the District of Columbia, 20–21 (1969).

[9] The number of these offenses has been increasing. See Annual Report of the Director of the Administrative Office of the United States Courts, 1970, at 268.

[10] "[I]t is desirable that punishment should follow offense as closely as possible; for its impression upon the minds of men is weakened by distance, and, besides, distance adds to the uncertainty of punishment, by affording new chances of escape." J. Benthem, The Theory of Legislation 326 (Ogden ed. 1931).

[11] To Establish Justice, To Insure Domestic Tranquillity, Final Report of the National Commission on the Causes and Prevention of Violence 152 (1969).

[12] Testimony of James V. Bennett, Director, Bureau of Prisons, Hearings before the Senate Subcommittee on Constitutional Rights, 88th Cong., 2d Sess., at 46 (1966).

[13] *E. g.*, the "Tombs" riots in New York City in 1970. N. Y. Times, Oct. 3, 1970, at 1, col. 8.

the Nation.[14] In addition, society loses wages which might have been earned, and it must often support families of incarcerated breadwinners.

A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.

Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.[15] As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. If, for example, the State moves for

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[14] The Challenge of Crime in a Free Society, A Report by the President's Commission on Law Enforcement and Administration of Justice 131 (1967).

[15] "[I]n large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." *United States* v. *Ewell*, 383 U. S. 116, 120 (1966).

a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects. It is impossible to do more than generalize about when those circumstances exist. There is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel or his right to a jury trial. Thus, as we recognized in *Beavers* v. *Haubert*, *supra*, any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:

> "The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice." 198 U. S., at 87.

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial,[16] but is the only possibly remedy.

III

Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right. The first suggestion

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[16] MR. JUSTICE WHITE noted in his opinion for the Court in Ewell, 383 U. S., at 121, that overzealous application of this remedy would infringe "the societal interest in trying people accused of crime, rather than granting them immunization because of legal error. . . ."

is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right.[17] The United States Court of Appeals for the Second Circuit has promulgated rules for the District Courts in that Circuit establishing that the government must be ready for trial within six months of the date of arrest, except in unusual circumstances, or the charge will be dismissed.[18] This type of rule is also recommended by the American Bar Association.[19]

But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

The second suggested alternative would restrict consideration of the right to those cases in which the accused has demanded a speedy trial. Most States have

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[17] For examples, see ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, at 14–16 (1968); Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 863 (1957).

[18] Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (1971).

[19] ABA, Project, *supra*, n. 17, at 14. For an example of a proposed statutory rule, see Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1619 (1965).

recognized what is loosely referred to as the "demand rule," [20] although eight States reject it.[21] It is not clear, however, precisely what is meant by that term. Although every Federal Court of Appeals that has considered the question has endorsed some kind of demand rule, some have regarded the rule within the concept of waiver,[22] whereas others have viewed it as a factor to be weighed in assessing whether there has been a deprivation of the speedy trial right.[23] We shall refer to the former ap-

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[20] *E. g., Pines* v. *District Court in and for Woodbury County*, 233 Iowa 1284, 10 N. W. 2d 574 (1943). See generally Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957); Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1601–1602 (1965).

[21] See *State* v. *Maddonado*, 92 Ariz. 70, 373 P. 2d 583 (*en banc*), cert. denied, 371 U. S. 928 (1962); *Hicks* v. *State*, 148 Colo. 26, 364 P. 2d 877 (1961) (*en banc*); *People* v. *Prosser*, 309 N. Y. 353, 130 N. E. 2d 891 (1955); *Zehrlaut* v. *State*, 230 Ind. 175, 102 N. E. 203 (1951); *Flanary* v. *Commonwealth*, 184 Va. 204, 35 S. E. 2d 135 (1945); *Ex parte Chalfant*, 81 W. Va. 93, 93 S. E. 1032 (1917); *State* v. *Hess*, 180 Kan. 472, 304 P. 2d 474 (1956); *State* v. *Dodson*, 226 Ore. 458, 360 P. 2d 782 (1961). But see *State* v. *Vawter*, 236 Ore. 85, 386 P. 2d 915 (1963).

[22] See *United States* v. *Hill*, 310 F. 2d 601 (CA4 1962); *Bruce* v. *United States*, 351 F. 2d 318 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *United States* v. *Perez*, 398 F. 2d 658 (CA7 1968), cert. denied, 393 U. S. 1080 (1969); *Pietch* v. *United States*, 110 F. 2d 817 (CA10), cert. denied, 310 U. S. 648 (1940); *Smith* v. *United States*, 331 F. 2d 784 (CADC 1964) (*en banc*). The opinion below in this case demonstrates that the Sixth Circuit takes a similar approach.

As an indication of the importance which these courts have attached to the demand rule, see *Perez*, *supra*, in which the Court held that a defendant waived any speedy trial claim, because he knew of an indictment and made no demand for an immediate trial, even though the record gave no indication that he was represented by counsel at the time when he should have made his demand and even though he was not informed by the court or the prosecution of his right to a speedy trial.

[23] Although stating that they recognize a demand rule, the approach of Eighth and Ninth Circuits' seems to be that a denial of

proach as the demand-waiver doctrine. The demand-waiver doctrine provides that a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right. This essentially was the approach the Sixth Circuit took below.

Such an approach, by presuming waiver of a fundamental right [24] from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). Courts should "indulge every reasonable presumption against waiver," *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389, 393 (1937), and they should "not presume acquiescence in the loss of fundamental rights," *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U. S. 292, 307

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speedy trial can be found despite an absence of a demand under some circumstances. See *Bandy* v. *United States*, 408 F. 2d 518 (CA8 1969) (a purposeful or oppressive delay may overcome a failure to demand); *Moser* v. *United States*, 381 F. 2d 363 (CA9 1967) (despite a failure to demand, the court balanced other considerations).

The Second Circuit's approach is unclear. There are cases in which a failure to demand is strictly construed as a waiver. *E. g.*, *United States* v. *DeMasi*, 445 F. 2d 251 (CA2 1971). In other cases, the Court has seemed to be willing to consider claims in which there was no demand. *E. g.*, *Solomon* v. *Mancusi*, 412 F. 2d 88 (CA2), cert. denied, 396 U. S. 936 (1969). Certainly the District Courts in the Second Circuit have not regarded the demand rule as being rigid. See *United States* v. *Mann*, 291 F. Supp. 268 (SDNY 1968); *United States* v. *Dillon*, 183 F. Supp. 541 (SDNY 1960).

The First Circuit also seems to reject the more rigid approach. Compare *United States* v. *Butler*, 426 F. 2d 1275 (CA1 1970), with *Needel* v. *Scafati*, 412 F. 2d 761 (CA1), cert. denied, 396 U. S. 861 (1969).

[24] See n. 2, *supra*.

(1937). In *Carnley* v. *Cochran*, 369 U. S. 506 (1962), we held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel, but intelligently and understandably rejected the offer. Anything less is not waiver." *Id.*, at 516.

The Court has ruled similarly with respect to waiver of other rights designed to protect the accused. See, *e. g.*, *Miranda* v. *Arizona*, 384 U. S. 436, 475–476 (1966); *Boykin* v. *Alabama*, 395 U. S. 238 (1969).

In excepting the right to speedy trial from the rule of waiver we have applied to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right. But it is not necessarily true that delay benefits the defendant. There are cases in which delay appreciably harms the defendant's ability to defend himself.[25] Moreover, a defendant confined to jail prior to trial is obviously disadvantaged by delay as is a defendant re-

[25] "If a defendant deliberately by-passes state procedure for some strategic, tactical, or other reason, a federal judge on habeas corpus may deny relief if he finds that the by-passing was the *considered* choice of the petitioner. The demand doctrine presupposes that failure to demand trial is a deliberate choice for supposed advantage on the assumption that delay always benefits the accused, but the delay does not inherently benefit the accused any more than it does the state. Consequently, a man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand." Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587, 1610 (1965) (footnotes omitted).

leased on bail but unable to lead a normal life because of community suspicion and his own anxiety.

The nature of the speedy-trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendants. A defendant has no duty to bring himself to trial;[26] the State has that duty as well as the duty of insuring that the trial is consistent with due process.[27] Moreover, for the reasons earlier expressed, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest.

It is also noteworthy that such a rigid view of the demand rule places defense counsel in an awkward position. Unless he demands a trial early and often, he is in danger of frustrating his client's right. If counsel is willing to tolerate some delay because he finds it reasonable and helpful in preparing his own case, he may be unable to obtain a speedy trial for his client at the end of that time. Since under the demand-waiver rule no time runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus,

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[26] As Mr. Chief Justice Burger wrote for the Court in *Dickey*:

"Although a great many accused persons seek to put off the confrontation as long as possible, the right to a prompt inquiry into criminal charges is fundamental and the duty of the charging authority is to provide a prompt trial." 398 U. S., at 37–38 (footnote omitted).

[27] As a circuit judge, Mr. Justice Blackmun wrote:

"The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to 'a speedy . . . trial' is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and knowledgeable." *Hodges* v. *United States*, 408 F. 2d 543, 551 (CA8 1969).

if the first demand is made three months after arrest in a jurisdiction which prescribes a six months rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances. The result in practice is likely to be either an automatic, *pro forma* demand made immediately after appointment of counsel or delays which, but for the demand-waiver rule, would not be tolerated. Such a result is not consistent with the interests of defendants, society, or the Constitution.

We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right.[28] This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right. Such a formulation avoids the rigidities of the demand-waiver rule and the resulting possible unfairness in its application. It allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable

[28] The American Bar Association also rejects the rigid demand-waiver rule:

"One reason for this position is that there are a number of situations, such as where the defendant is unaware of the charge or where the defendant is without counsel, in which it is unfair to require a demand . . . . Jurisdictions with a demand requirement are faced with the continuing problem of defining exceptions, a process which has not always been carried out with uniformity . . . . More important, the demand requirement is inconsistent with the public interest in prompt disposition of criminal cases. . . . [T]he trial of a criminal case should not be unreasonably delayed merely because the defendant does not think that it is in his best interest to seek prompt disposition of the charge." ABA, Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial 17 (1968).

formal procedural rule. It would permit, for example, a court to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client or from a situation in which no counsel is appointed. It would also allow a court to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection.

In ruling that a defendant has some responsibility to assert a speedy-trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made. Such cases have involved rights which must be exercised or waived at a specific time or under clearly identifiable circumstances, such as the rights to plead not guilty, to demand a jury trial, to exercise the privilege against self incrimination, and to have the assistance of counsel. We have shown above that the right to a speedy trial is unique in its uncertainty as to when and under what circumstances it must be asserted or may be deemed waived. But the rule we announce today, which comports with constitutional principles, places the primary burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside.

We, therefore, reject both of the inflexible approaches—the fixed time period because it goes further than the Constitution requires; the demand-waiver rule because it is insensitive to a right which we have deemed fundamental. The approach we accept is a balancing

test, in which the conduct of both the prosecution and the defendant are weighed.[29]

IV

A balancing test necessarily compels courts to approach speedy-trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.[30]

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the pecu-

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[29] Nothing we have said should be interpreted as disapproving a presumptive rule adopted by a court in the exercise of its supervisory powers which establishes a fixed time period within which cases must normally be brought. See n. 19, *supra*.

[30] See, *e. g.*, *United States* v. *Simmons*, 338 F. 2d 804, 807 (CA2 1964), cert. denied, 380 U. S. 983 (1965); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 478 n. 15 (1968).

In his concurring opinion in *Dickey*, MR. JUSTICE BRENNAN identified three factors for consideration: the source of the delay, the reasons for it, and whether the delay prejudiced the interests protected by the right. 398 U. S., at 48. He included consideration of the defendant's failure to assert his right in the cause of delay category, and he thought the length of delay was relevant primarily to the reasons for delay and its prejudicial effects. *Id.*, n. 12. In essence, however, there is little difference between his approach and the one we adopt today. See also Note, the Right to a Speedy Trial, *supra*, for another slightly different approach.

liar circumstances of the case.[31] To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government.[32] A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in de-

[31] For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony. *United States* v. *Butler*, 426 F. 2d 1275, 1277 (CA1 1970).

[32] We have indicated on previous occasions that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants] or to harass them." *United States* v. *Marion*, 404 U. S. 307, 325 (1971). See *Pollard* v. *United States*, 352 U. S. 354, 361 (1957).

termining whether the right is being deprived. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.[33] Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

We have discussed previously the societal disadvantages of lengthy pretrial incarceration, but obviously the disadvantages for the accused who cannot obtain his release are even more serious. The time spent in jail awaiting trial has a detrimental impact on the individual. It often means loss of a job; it disrupts family life; and it enforces idleness. Most jails offer little or no recreational or rehabilitative programs.[34] The time spent in jail is simply dead time. Moreover, if a defendant is

[33] *United States* v. *Ewell*, 383 U. S. 116, 120 (1966); *Smith* v. *Hooey*, 393 U. S. 374, 377–378 (1969). In *Klopfer* v. *North Carolina*, 386 U. S. 213, 221–222 (1967), we indicated that a defendant awaiting trial on bond might be subjected to public scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes.

[34] See To Establish Justice, To Insure Domestic Tranquility, Final Report of the National Commission on the Causes and Prevention of Violence, 152 (1969).

locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.[35] Imposing those consequences on anyone who has not yet been convicted is serious. It is especially unfortunate to impose them on those persons who are ultimately found to be innocent. Finally, even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility. See cases cited in n. 33, *supra*.

We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process.[36] But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

V

The difficulty of the task of balancing these factors is illustrated by this case, which we consider to be close. It is clear that the length of delay between arrest and trial—well over five years—was extraordinary. Only seven months of that period can be attributed to a strong excuse, the illness of the ex-sheriff who was in

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[35] There is statistical evidence that persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release although other factors bear upon this correlation. See Wald, Pretrial Detention and Ultimate Freedom: A Statistical Study, 39 N. Y. U. L. Rev. 631 (1964).

[36] For an example of how the speedy trial issue should be approached, see Judge Frankel's excellent opinion in *United States* v. *Mann*, 291 F. Supp. 268 (SDNY 1968).

charge of the investigation. Perhaps some delay would have been permissible under ordinary circumstances, so that Manning could be utilized as a witness in Barker's trial, but more than four years was too long a period, particularly since a good part of that period was attributable to the Commonwealth's failure or inability to try Manning under circumstances that comported with due process.

Two counter-balancing factors, however, outweigh these deficiencies. The first is that prejudice was minimal. Of course, Barker was prejudiced to some extent by living for over four years under a cloud of suspicion and anxiety. Moreover, although he was released on bond for most of the period, he did spend 10 months in jail before trial. But there is no claim that any of Barker's witnesses died or otherwise became unavailable owing to the delay. The trial transcript indicates only two very minor lapses of memory—one on the part of a prosecution witness—which were in no way significant to the outcome.

More important than the absence of serious prejudice, is the fact that Barker did not want a speedy trial. Counsel was appointed for Barker immediately after his indictment and represented him throughout the period. No question is raised as to the competency of such counsel.[37] Despite the fact that counsel had notice of the motions for continuances,[38] the record shows no action whatever taken between October 21, 1958, and February 12, 1962, that could be construed as the assertion of the speedy-trial right. On the latter date, in response to another motion for continuance, Barker moved to dismiss the indictment. The record does not show on what ground this motion was based, although it is clear

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[37] Tr. of Oral Arg., at 39.

[38] *Id.*, at 4.

that no alternative motion was made for an immediate trial. Instead the record strongly suggests that while he hoped to take advantage of the delay in which he had acquiesced, and thereby obtain a dismissal of the charges, he definitely did not want to be tried. Counsel conceded as much at oral argument:

> "Your honor, I would concede that Willie Mae Barker—probably—I don't know this for a fact—probably did not want to be tried. I don't think any man wants to be tried. And I don't consider this a liability on his behalf. I don't blame him." Tr. of Oral Arg., at 39.

The probable reason for Barker's attitude was that he was gambling on Manning's acquittal. The evidence was not terribly strong against Manning, as the reversals and hung juries suggest, and Barker undoubtedly thought that if Manning were acquitted, he would never be tried. Counsel also conceded this:

> "Now, it's true that the reason for this delay was the Commonwealth of Kentucky's desire to secure the testimony of the accomplice, Silas Manning. And it's true that if Silas Manning were never convicted, Willie Mae Barker would never have been convicted. We concede this." Tr., at 15.[39]

That Barker was gambling on Manning's acquittal is also suggested by his failure, following the *pro forma* motion to dismiss filed in February 1962, to object to

[39] Hindsight is, of course, 20/20, but we cannot help noting that if Barker had moved immediately and persistently for a speedy trial following indictment and if he had been successful, he would have undoubtedly been acquitted, since Manning's testimony was crucial to the Commonwealth's case. It could not have been anticipated at the outset, however, that Manning would have been tried six times over a four-year period. Thus, the decision to gamble on Manning's acquittal may have been a prudent choice at the time it was made.

the Commonwealth's next two motions for continuances. Indeed, it was not until March 1963, after Manning's convictions were final, that Barker, having lost his gamble, began to object to further continuances. At that time, the Commonwealth's excuse was the illness of the ex-sheriff, which Barker has conceded justified the further delay.[40]

We do not hold that there may never be a situation in which an indictment may be dismissed on speedy-trial grounds where the defendant has failed to object to continuances. There may be a situation in which the defendant was represented by incompetent counsel, was severely prejudiced, or even cases in which the continuances were granted *ex parte*. But barring extraordinary circumstances, we would be reluctant indeed to rule that a defendant was denied this constitutional right on a record that strongly indicates, as does this one, that the defendant did not want a speedy trial. We hold, therefore, that Barker was not deprived of his due process right to a speedy trial.

The judgment of the Court of Appeals is

Affirmed.

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[40] At oral argument, counsel for Barker stated:

"That was after the sheriff, the material witness, was ill; the man who had arrested the petitioner, yes. And the Sixth Circuit held that this was a sufficient reason for delay, and we don't deny this. We concede that this was sufficient for the delay from March 1963 to October, but it does not explain the delays prior to that." Tr. of Oral Arg., at 19–20.

SUPREME COURT OF THE UNITED STATES

No. 71–5255

Willie Mae Barker, Petitioner, *v.* John W. Wingo, Warden. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[June 22, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, concurring in the judgment and opinion of the Court.

Although the Court rejects petitioner's speedy trial claim and affirms denial of his petition for habeas corpus, it is apparent that had Barker not so clearly acquiesced in the major delays involved in this case, the result would have been otherwise. From the State's point of view, it is fortunate that the case was set for early trial and that postponements took place only upon formal requests to which Barker had opportunity to object.

Because the Court broadly essays the factors going into constitutional judgments under the speedy trial provision, it is appropriate to emphasize that one of the major purposes of the provision is to guard against inordinate delay between public charge and trial, which, wholly aside from possible prejudice to a defense on the merits, may "seriously interfere with the defendant's liberty, whether he is free on bail or not, may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy and create anxiety in him, his family and friends." *United States* v. *Marion*, 404 U. S. 307, 320 (1971). These factors are more serious for some than for others, but they are inevitably present in every case to some extent, for every defendant will either be incarcerated pending trial

or on bail subject to substantial restrictions on his liberty. It is also true that many defendants will believe that time is on their side and will prefer to suffer whatever disadvantages delay may entail. But for those who desire an early trial, these personal factors should prevail if the only countervailing considerations offered by the State are those connected with crowded dockets and prosecutorial case loads. A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial. "[T]he evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." *United States* v. *Marion*, *supra*, at 320.

Of course, cases will differ among themselves as to the allowable time between charge and trial so as to permit prosecution and defense adequately to prepare their case. But unreasonable delay in run-of-the-mill criminal cases cannot be justified by simply asserting that the public resources provided by the State's criminal justice system are limited and that each case must await its turn. As the Court points out, this approach also subverts the State's own goals in seeking to enforce its criminal laws.